Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, APPELLANT

v.

RAY HAYS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the intentional creation of a majority-minority district is always subject to strict scrutiny.

2. Whether the boundaries of District 4 in Louisiana's redistricting plan are so bizarre on their face that they can be understood only as an effort to segregate voters into separate districts because of their race.

3. Whether the State's creation of District 4 is narrowly tailored to further a compelling interest.

PARTIES TO THE PROCEEDING

Plaintiffs are Ray Hays, Edward Adams, Susan Shaw Singleton and Gary Stokely.

Defendants are Edwin Edwards, Governor of the State of Louisiana; Samuel B. Nunez, President of the Louisiana State Senate; John A. Alario, Speaker of the Louisiana House of Representatives; W. Fox McKeithen, Secretary of State of Louisiana; and Jerry Fowler, the Commissioner of Elections for the State of Louisiana.

The United States intervened as a defendant.

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OPINIONS BELOW

The second opinion of the three-judge district court (App., *infra*, 1a-23a) is not yet reported. The first opinion of the three-judge district court (App., *infra*, 39a-109a) is reported at 839 F. Supp. 1188, vacated, 114 S. Ct. 2731.

JURISDICTION

The judgment of the three-judge court was entered on July 26, 1994. App., *infra*, 24a-26a. A notice of appeal was filed on July 26, 1994. App., *infra*, 115a-116a. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." The relevant statutory provisions are Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. 1973, 1973c, which are reproduced in the Appendix, *infra*, 117a-119a.

STATEMENT

This case concerns a challenge to a congressional redistricting plan adopted by the State of Louisiana which contains two majority-minority districts. A three-judge court invalidated the plan after finding that one of those districts violated the standards for race-conscious redistricting established in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993). The United States, a defendant-intervenor below, has appealed from that judgment. The State of Louisiana has also appealed.

1. The population of the State of Louisiana is more than 30% black. Blacks comprise 28% of Louisiana's voting age population and nearly 28% of its registered voters. From Reconstruction until the 1980s, black voters had not been in the majority in any of that State's congressional districts. As a result of litigation following the 1980 census, a three-judge court ordered redistricting which resulted in blacks constituting a majority in one of the State's eight congressional districts. *Major* v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court).

In 1991, Louisiana redistricted the eight districts of the Board of Elementary and Secondary Education (B.E.S.E.). Traditionally, the boundaries of the eight B.E.S.E. districts had been similar to the boundaries of the State's congressional lines. The new B.E.S.E. plan created only one majority-minority district. Louisiana, a State covered by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, submitted the plan to the Justice Department for preclearance. Acting on behalf of the Attorney General (28 C.F.R. 51.3), the Assistant Attorney General for the Civil Rights Division interposed an objection under Section 5, stating that the State's minority population was large enough and compact enough to create two majority-minority districts, and that the State had not carried its burden of showing that its decision to create only one such district did not have a discriminatory purpose. DX 16-17. In response to that objection, the State adopted a new plan that created two majority-minority districts, which the Assistant Attorney General then precleared.

As a result of the 1990 Census, Louisiana lost one of its congressional seats. App., *infra*, 55a. In May, 1992, the State legislature enacted a districting plan for the seven remaining seats. *Id.* at 39a. That plan included two majority-black districts: One was centered in the City of New Orleans and was similar to the majority-black district in the plan used in the 1980s; the other (District 4) was a Z-shaped district that began in the northwest corner of the State, went east along the State's northern border, ran south down the Mississippi River to the center of the State, and ended with three western extensions. *Id.* at 41a, 62a-63a. The State's plan was precleared by the Department of Justice.

Appellees, four voters living in Lincoln Parish, Louisiana, challenged that plan on the ground that it segregated voters into districts on the basis of race, in violation of the Equal Protection Clause. App., *infra*, 42a. In December, 1993, a three-judge court ruled in favor of appellees. *Id.* at 39a-109a. The court held that "[a] legislature creates a racially-gerrymandered districting plan when it *intentionally* draws one or more districts along racial lines or otherwise intentionally segregates citizens into voting districts based on their race." *Id.* at 48a. In the court's view, that intent may be proven "*indirectly* or *inferentially* * * * when districts are so bizarrely shaped that they presumptively bespeak an impermissible purpose" or "by *direct* evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on their race." *Id.* at 50a. The court found that appellees had proven racial gerrymandering in both ways. *Id.* at 51a.

Applying strict scrutiny, the court assumed that the State had one or more compelling interests in creating a second majority-black district. App., *infra*, 79a. The court went on to hold, however, that the State's plan was not narrowly tailored to further those interests for two reasons. First, the court found that the plan packed more black voters into District 4 than was "reasonably necessary to give blacks a realistic chance to determine the outcome of elections there." *Id.* at 83a. The court noted that while blacks clearly have a realistic chance to elect candidates of their choice in a district that is 55% black in voting age population, District 4 was 63% black in voting age population. *Id.* at 83a-84a. Second, the court found that "a second black majority district could have been drawn that would have done substantially less violence to traditional redistricting principles." *Id.* at 85a.

The State appealed. While that appeal was pending, the State passed a new redistricting plan (Act

1), with a newly configured majority-minority District 4. That plan was precleared by the Department of Justice under Section 5. On June 27, 1994, this Court vacated the district court's judgment and remanded the case for further proceedings in light of the new plan. App., *infra*, 2a.

2. Appellees then filed an amended complaint, challenging new District 4 on equal protection grounds. App., *infra*, 2a. The United States intervened to defend the plan. The court then held a two-day trial. *Ibid.*

The evidence at trial showed that the legislative aide who drafted the new plan, Glenn Koepp, was given instructions by two state senators to attempt to devise a plan that would accommodate the concerns expressed in the district court's 1993 opinion, while still creating a second majority-black district. Koepp Test., 7/21/94 A.M. Tr. 5-8. To accomplish these purposes, the senators suggested that Koepp model the district on old District 8, a district that the State had used in plans in the 1970s. *Id.* at 11. Old District 8 generally began in the western part of the State, included areas along the Red and Mississippi Rivers as it moved in a southeast direction, and ended beyond Baton Rouge. App., *infra*, 111a-114a. One version of old District 8 in use from 1971-1972 ran from the western border of the State all the way east to Lake Ponchartrain. *Id.* at 112a. During redistricting hearings, the state Senate was shown maps of various versions of old District 8. State's Exh. 1 (Senate Comm. Tr. 236-253, 270).

Blacks are geographically concentrated in much of the area covered by the various configurations of old District 8, particularly along the Red and Mississippi Rivers. Koepp Test., 7/21/94 A.M. Tr. 13-

14; Hillard Test., 7/21/94 P.M. Tr. 67. The area along the Red River Valley is also an important economic region and the people in that region share common interests. Hillard Test., 7/21/94 P.M. Tr. 47-48.

Using old District 8 as a model, Koepp devised new District 4. The new district begins in the northwest part of the State near Shreveport, runs diagonally southeast along the Red River to Alexandria, and then further southeast along the Mississippi River past Baton Rouge. App., *infra*, 110a. The district is approximately 55% black in registered voters. Koepp Test., 7/21/94 A.M. Tr. 17. In devising the district, Koepp tried to keep small towns, precincts, and parishes intact, retain existing districts as much as possible, reflect communities of interest, and separate incumbents. *Id.* at 8, 14-26; Brinkhaus Test., 7/22/94 A.M. Tr. 11, 31-32. To satisfy the one person, one vote rule and other objectives in the plan, 14 of Louisiana's 64 parishes were divided. Koepp Test., 7/21/94 A.M. Tr. 11. The plan used in the 1980s had divided seven parishes. App., *infra*, 65a.

The legislature made several minor adjustments in the plan to satisfy incumbents' concerns about the political makeup of their districts. Koepp Test., 7/21/94 A.M. Tr. 48; Bagneris Test., 7/21/94 P.M. Tr. 119. Those adjustments made District 4 somewhat more irregular. State's Exh. 11.

Voting in Louisiana is racially polarized, and blacks in Louisiana have not been elected to Congress except from districts in which blacks have constituted a majority of registered voters. Engstrom Test., 7/21/94 P.M. Tr. 16-18; State's Exh. 13. Aware of that reality, the state legislature attempted to create a second majority-minority district in order to comply with the requirements of Sections 2 and 5 of the Voting Rights Act, and to continue to remedy Louisiana's history of discrimination in voting. Koepp Test., 7/21/94 A.M. Tr. 18-22; Bagneris Test., 7/21/94 P.M. Tr. 106-107, 110; Brinkhaus Test., 7/22/94 A.M. Tr. 6, 24-27.

3. On July 25, 1994, the district court held the new plan unconstitutional. App., *infra*, 24a-26a. The district court enjoined further use of the plan, and required 1994 elections to be held under a plan drawn by the court. *Ibid.* The court did not afford the parties an opportunity to examine or raise objections to its plan. The court's plan creates one majority-black district; all other districts are less than 30% black in registered voters. *Id.* at 33a. Under the court's plan, Cleo Fields, who currently represents the majority-black district the court found unconstitutional in its first opinion, is paired with a white incumbent in a district that is more than 70% white. No other incumbents are paired.

The district court issued an opinion explaining its decision on July 29, 1994. App., *infra*, 1a-23a. That opinion also readopts the court's first opinion. *Id.* at 2a. The court first found that "the bizarre and irregular shape of District Four raises an inference that the Louisiana Legislature classified its citizens along racial lines and segregated them into voting districts accordingly." *Id.* at 3a. That finding, the court held, shifted the burden to the State and the United States to rebut that inference. *Ibid.*

After reviewing all the evidence, the court concluded that "Act 1 can only be explained credibly as the product of race-conscious decisionmaking." App., *infra,* 4a. In support of that conclusion, the court relied primarily on the fact that the legislators who testified admitted that race played a "large if not dominant role in the map as it is now drawn." *Ibid.* The court rejected the State's contention that non-racial considerations also played an important role in the drawing of District 4. In the court's view, the State's assertion that the residents along the Red River had common interests was a "*post hoc* rationalization." *Id.* at 4a-5a. The court also concluded that the State's assertion that it relied on the design of old District 8 was "mere pretext." *Id.* at 5a. While the court acknowledged that "other factors" affected the way in which District 4 was drawn, the court concluded that the "*fundamental factor driving Act 1 was race.*" *Ibid.*

The court then held that "[r]ace-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." App., *infra,* 5a. The court noted that this Court had applied a more deferential standard to race-conscious redistricting in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U.S. 144 (1977) (*UJO*). App., *infra,* 5a. The court concluded, however, that *City of Richmond* v. *J.A. Croson Co.,* 488 U.S. 469 (1989), undermined the holding in *UJO,* and required strict scrutiny of all race-conscious redistricting. App., *infra,* 6a.

The court went on to hold that the State had not proven that its consideration of race was supported by a compelling interest. App., *infra,* 6a-7a. The court concluded that Section 5 "cannot be read to compel the results of Act 1" because "[n]either the State nor the Department of Justice offered any evidence suggesting that failure to create a second majority-minority district would either be a retrogression of minority strength or have an illegal purpose or effect." *Id.* at 8a. The court further concluded that a second majority-minority district was not compelled by Section 2 because proof of a "numerous and compact minority" is a precondition for a Section 2 dilution claim and "the evidence convincingly proves that the State cannot clear [that] hurdle." App., *infra*, 8a. Finally, the district court rejected the State's assertion that the creation of a majority-minority district furthered the State's interest in remedying its history of racial discrimination. *Id.* at 9a-10a. The court concluded that "[w]ithout concrete evidence of the lingering effects of past discrimination * * * we cannot agree that the resegregation of Louisiana by racially configured voting districts is warranted." *Id.* at 10a.

Turning to the question of remedy, the court stated that it had adopted its own plan because of "the lateness of the hour, the dismal history of the Legislature in two previous attempts, foot-dragging by the defendants in the appeals and the risk that Louisiana might be without Congressional representation in January 1995." App., *infra*, 10a. The court noted that its plan "split only 6 parishes," followed "traditional lines," divided only one town, and "ignore[d] all political considerations." *Id.* at 10a-11a.

Chief Judge Shaw issued a separate opinion, also joined by Judge Wiener, which generally tracked the findings and conclusions of the court. App., *infra*, 13a-23a. Chief Judge Shaw believed that District 4 "completely disregards the traditional districting principles of compactness, respect for political subdivisions, and respect for commonality of interests." *Id.* at 15a. He also stressed that the "old eighth district was never challenged on constitutionality" and therefore has "no application to this case." *Id.* at 18a.

On August 11, 1994, this Court stayed the district court order, permitting the 1994 congressional elections to proceed under the State's plan.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Court should note probable jurisdiction of this appeal. The district court has seriously misconstrued this Court's decision in *Shaw* and has decided several related questions that are of substantial importance in voting rights litigation now pending throughout the country. Unless reversed, the court's decision will significantly hamper state efforts to comply voluntarily with the Voting Rights Act. Full briefing and argument is therefore warranted.

1. The district court held that "race conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." App., *infra,* 5a. That holding is inconsistent with *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U.S. 144 (1977). In *UJO,* seven of the eight Justices participating voted to uphold a plan that deliberately created majority-minority districts without subjecting that plan to strict scrutiny. Five Justices specifically agreed that the intentional creation of majority-minority districts is not unconstitutional, absent proof that the proposed plan has the intent and effect of diluting the majority's voting strength. See *id.* at 165 (opinion of White, J. joined by Stevens & Rehnquist, JJ.); *id.* at 179-180 (Stewart, J. joined by Powell, J., concurring).

In adverting to that issue in *Shaw,* this Court "express[ed] no view as to whether 'the intentional creation of majority-minority districts, without more,' always gives rise to an equal protection claim." 113 S. Ct. at 2828. The Court did not purport to overrule *UJO*. Instead, it distinguished *UJO* on the ground that the State in that case had "adhered to traditional districting principles." *Id.* at 2829. This Court also repeatedly stated in *Shaw* that its holding was limited to those rare cases when a State creates a district that is "*so extremely irregular on its face* that it rationally can be viewed only as an effort to segregate the races for purposes of voting." *Id.* at 2824 (emphasis added); *id.* at 2825, 2826, 2828, 2830. The district court's holding that Louisiana's admitted intent to create a majority-minority district automatically triggered strict scrutiny is therefore in conflict with *UJO* and unsupported by *Shaw*.

The district court's holding has widespread implications. As Justice White has stated, "bloc voting by race * * * is a fact of life well known to those responsible for drawing electoral district lines. These lawmakers are quite aware that the districts they create will have a white or a black majority; and with each new district comes the unavoidable choice as to the racial composition of the district." *Beer* v. *United States*, 425 U.S. 134, 144 (1976) (White, J., dissenting). In such circumstances, a holding that the intentional use of race to draw district lines is automatically suspect has the potential to make a wide range of redistricting plans at all levels of government constitutionally suspect.

Moreover, Sections 2 and 5 of the Voting Rights Act often require race-conscious redistricting. Under the district court's decision in this case, however, race-conscious redistricting undertaken to comply with Sections 2 and 5 will invariably be treated as constitutionally suspect. The inevitable result will be to chill voluntary compliance by the States with those important statutes.

In addition to the district court in this case, four other three-judge courts have addressed the question whether race-conscious redistricting always triggers strict scrutiny. Those decisions reflect a full range of views on when strict scrutiny is required. In *DeWitt* v. *Wilson*, No. CIV-S-93-535 (E.D. Cal. June 27, 1994), slip op. 4, the district court held that "in redistricting, consciousness of race does not give rise to a claim of racial gerrymandering when race is considered along with traditional redistricting principles, such as compactness, contiguity, and political boundaries." In *Vera* v. *Richards*, C.A. No. H-94-0277 (S.D. Tex. Aug. 17, 1994), the court reached the same conclusion. That court held that strict scrutiny is appropriate only when a district is "highly irregular" and ignores "traditional districting criteria." Slip op. 92. In contrast, in *Shaw* v. *Hunt*, No. 92-202-CIV-5-BR (E.D.N.C. Aug. 1, 1994), slip op. 40-41, the district court held that strict scrutiny is appropriate whenever "racial considerations played a 'substantial' or 'motivating' role in the line-drawing process, even if they were not the only factors that influenced that process." Finally, in *Johnson* v. *Miller*, No. 194-008 (S.D. Ga. Sept. 12, 1994), slip op. 37, the court held that strict scrutiny is applicable when race is the "*overriding, predominant force* determining the lines of the district," but does not apply when race is "one factor among *many of equal or greater significance.*" That wide divergence of views on the threshold question of when strict scrutiny is required reinforces the conclusion that the issue is one that warrants this Court's plenary consideration. This case presents an appropriate vehicle for resolving that issue.

2. The district court went on to find that District 4 is "bizarre" and "can only be explained credibly as the product of race-conscious decisionmaking." App., *infra*, 3a. This case therefore also raises the question of the proper approach in determining that important *Shaw* issue.

a. Because the Constitution does not require a State to tailor its districts to any absolute measure of compactness, *Shaw*, 113 S. Ct. at 2827, the manner in which the State has drawn and continues to draw other districts is a proper benchmark for determining whether a particular majority-minority district is "bizarre." A bizarre district is one that reflects an extraordinary departure from a State's usual districting practices. See *Cane* v. *Worcester County, Maryland*, No. 94-1579 (4th Cir. Sept. 16, 1994), slip op. 9 n.6; cf. *Jeffers* v. *Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989), aff'd mem., 498 U.S. 1019 (1991). The manner in which the State has drawn other districts is also relevant in deciding whether a particular majority-minority district "on its face * * * rationally can be viewed only as an effort to segregate the races for purposes of voting." *Shaw*, 113 S. Ct. at 2824. When a district resembles districts that a State has drawn for reasons having nothing to do with creating a majority-minority district, it is improper to conclude that such a district can only be understood as a racial gerrymander.

Application of these principles leads to the conclusion that Louisiana's District 4 should not have been subjected to strict scrutiny under *Shaw*. First, that district resembles the Eighth District in congressional plans that the State used from 1967-1972.

App., *infra*, 110a-112a. The plans in use between 1973 and 1992 also contained a district in the same general area. *Id.* at 113a-114a. In none of these districts did blacks constitute a voting majority. Given that history, District 4 cannot be considered bizarre on its face. Nor can it be understood solely as an effort to segregate voters on the basis of race.

Quite apart from its resemblance to old District 8, the shape of District 4 fits comfortably within the State's ordinary districting practices. As the map of the State's plan illustrates (App., *infra*, 110a), District 4 is reasonably compact and contiguous. It is generally wide and straight. Unlike old District 4, it does not meander over disconnected parts of the State, nor is it comprised of a series of "fingers" reaching out from the core. District 4 follows the Red River and then the Mississippi River, two important geographical features in the State, and the population that is concentrated along those rivers shares common interests.

District 4 is not a square or circle. *Shaw*, however, does not treat as suspect any deviation from geometric regularity. Suspect treatment is reserved for truly bizarre districts that, on their face, evidence a single-minded pursuit of racial goals, with little or no consideration for other districting values. District 4 is not such a district. It reflects a conscientious effort to create a majority-minority district, while simultaneously pursuing other traditional Louisiana districting values. It is therefore not suspect under *Shaw*.[1]

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[1] The relevant inquiry under *Shaw* is whether the district as a whole is bizarre, not whether isolated segments of it are. Virtually every redistricting plan will have some lines that, when viewed in isolation, look quite irregular, and this plan is no exception. It is worth noting that some of the less regu-

b. The district court rejected the State's reliance on the fact that District 4 resembles old District 8 and encompasses a community of interest along the Red and Mississippi Rivers as "*post hoc* rationalization" and "mere pretext." App., *infra*, 5a. In reaching that conclusion, the court relied primarily on the admissions of state legislators that race played a large role in the drawing of District 4. *Ibid.* The district court's analysis is flawed for two reasons.

First, the relevant inquiry under *Shaw* is whether a district is so bizarre *on its face* that it can be understood only as a racial gerrymander. 113 S. Ct. at 2824. Those terms mandate an objective inquiry, not an inquiry into the legislature's subjective intent based on after-the-fact statements made by legislators. *Johnson* v. *Miller*, slip op. 7-8 (Edmondson, J., dissenting). The resemblance of District 4 to old District 8 and the presence of a community of interest along the Red and Mississippi Rivers are objective indications that District 4 is not bizarre and cannot be understood solely as an effort to segregate voters on the basis of race. Those factors are therefore of crucial relevance in evaluating appellees' *Shaw* claim. Conversely, the fact that state legislators conceded that the State intended to draw a majority-minority district is not determinative of a *Shaw* claim. Under *Shaw*, there is nothing suspect about a State's desire to draw a majority-minority district.

Second, the district court seems to have misunderstood what the State sought to prove by introducing

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lar lines at the mid-point of District 4 were constructed to satisfy the political preferences of incumbent legislators, a routine consideration in the enactment of redistricting plans; other unusual looking lines in the district follow oddly shaped precinct lines. Koepp Test., 7/21/94 A.M. Tr. 30, 48; Bagneris Test., 7/21/94 P.M. Tr. 119; Brinkhaus Test., 7/22/94 A.M. Tr. 9, 14.

evidence that District 4 resembles old District 8 and includes persons with common interests. The point of the evidence was not to show that race played no role in the drawing of District 4; it admittedly played an important one. Rather, the point of that evidence was to show that the State was attempting to draw a majority-minority district in a way that was consistent with other traditional redistricting interests. The State's acknowledgement that it intended to create a majority-minority district is not at all inconsistent with its assertion that it also took into account the traditional districting values served by creating a district that resembled prior districts and that included persons with common interests. That acknowledgement provides no basis for the court's finding that the State's reliance on those other factors was pretextual.[2]

The reasons given by Chief Judge Shaw for finding the State's plan suspect under *Shaw* are equally unpersuasive. Chief Judge Shaw concluded that the State's plan "completely disregards" the traditional districting principle of respect for political subdivisions because District 4 splits 12 parishes and four cities. App., *infra*, 15a-17a. In Louisiana, however, parish and city lines have never been sacrosanct. The

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[2] In rejecting the State's reliance on old District 8, the district court also attributed significance to the fact that it was "never challenged" and "was crafted for the purpose of ensuring the reelection of Congressman Gillis Long." App., *infra*, 5a. Legislation that has not been challenged, however, is presumptively constitutional. Moreover, if old District 8 was drawn to ensure the reelection of an incumbent nonminority Congressman, then, in the absence of any significant demographic changes in the region, it calls into question the conclusion that District 4, which follows similar lines and directions, can be understood only as an effort to segregate black and white residential areas.

1980 redistricting plan divided seven parishes, and the court's own plan divided six. *Id.* at 10a-11a, 65a. Congressional redistricting plans throughout the twentieth century have split the city of New Orleans. U.S. Exh. 4. District 4's splitting of parish and city lines does not make it bizarre.

Chief Judge Shaw also concluded that the State's plan completely disregards the traditional principle of "respect for commonality of interests" because District 4 includes different religious groups and different agricultural interests. App., *infra*, 15a, 17a. With only seven districts, however, it is impossible for Louisiana to create districts composed of persons who have similar interests on every conceivable social and economic issue. Uncontradicted evidence shows that persons in District 4 share some important common interests. Hillard Test., 7/21/94 P.M. Tr. 47-48. Chief Judge Shaw's view that the State should have given greater weight to religious and agricultural differences reflects his own redistricting preferences. It does not show that District 4 is bizarre.

3. Even if the district court were right in subjecting District 4 to strict scrutiny, it erred in concluding that the State did not have a compelling interest in drawing a second majority-minority district. In *Shaw*, this Court provided some general guidance on how to determine whether a State has a compelling interest in creating a majority-minority district. 113 S. Ct. at 2830-2832. This case provides an opportunity to provide more concrete guidance on that central issue.

a. A State has a compelling interest in complying with Sections 2 and 5 of the Voting Rights Act. See *Shaw*, 113 S. Ct. at 2830. The district court did not suggest otherwise. Instead, reviewing the evidence *de novo*, the district court concluded that the State's creation of District 4 was not compelled by Section 2 or Section 5. App., *infra*, 6a-9a. Under this Court's decisions, however, a State is not required to show that its actions were in fact required by law in order to take remedial action. A State need only show that it had a "strong basis in evidence" for its actions—a standard that is satisfied if the State reasonably believes that its failure to take the measure would lead to a prima facie case of discrimination against it. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 292-293 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

With regard to Section 2, a State would have a compelling interest in creating a majority-minority district when the three preconditions for a vote dilution claim set forth in *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986), are present. See *Shaw* v. *Hunt*, slip op. 62-64. Strong evidence that each of those preconditions existed was present here. The record demonstrates that blacks in Louisiana are politically cohesive and that unless they constitute a majority in a district, their candidates of choice will be defeated by whites voting as a bloc. The record also shows that the concentration of minorities along the Red and Mississippi Rivers is sufficiently large and compact to constitute a majority in a district. Accordingly, the State had a reasonable basis for concluding that the creation of a second majority-minority district was required in order to comply with Section 2.

The district court found that a second majority-minority district was not compelled by Section 2 because no geographically compact district could be drawn. App., *infra*, 8a. The *Gingles* compactness requirement, however, does not demand compactness in any absolute sense. Rather, the question in circumstances like those presented here is whether the proposed majority-minority district is reasonably compact in light of a State's traditional redistricting practices. *Jeffers* v. *Clinton*, 730 F. Supp. at 207. As already noted, District 4 is similar in compactness to previous districts drawn by the State in the same general area. *Gingles* requires no more.

The State also had a reasonable basis for concluding that the creation of a second majority-minority district was required by Section 5. By 1992, the Department of Justice had already refused Section 5 preclearance to the B.E.S.E. plan on the ground that the State had not shown that its failure to create a second majority-minority district was free of discriminatory purpose. DX 16-17. From that experience, the State reasonably believed that it would also have difficulty satisfying its burden to show that its failure to create a second majority-minority congressional district complied with Section 5.

The district court apparently believed that the State could not rely on the Attorney General's objection to its B.E.S.E. plan, but was required to show that the objection was in fact a legally valid one. App., *infra*, 7a & n.3. That approach was incorrect. The Attorney General is required under Section 5 to object to a redistricting plan when the State is unable to demonstrate that it is free of discriminatory purpose. *City of Richmond* v. *United States*, 422 U.S. 358, 372-373 (1975). The Attorney General's objection based on such a determination constitutes an "administrative finding of discrimination." *Regents of the Univ. of Calif.* v. *Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, J.); *Shaw* v. *Hunt*, slip op. 67-69. Such a finding provides the

State with a basis for believing that remedial action is necessary. *Ibid.*

b. Independent of its obligations under the Voting Rights Act, the State had a compelling interest in ameliorating the effect that racially polarized voting has had on the opportunity for minority voters in Louisiana to elect the candidates of their choice. See *Croson*, 488 U.S. at 491-493 (opinion of O'Connor, J.). When whites persist in voting as a bloc against minority preferred candidates, a State can take steps through redistricting to "alleviate the consequences of racial voting at the polls." *UJO*, 430 U.S. at 166-168 (opinion of White, J., joined by Stevens & Rehnquist, JJ.).

The district court determined that there are no lingering effects of discrimination that would justify such remedial action. App., *infra*, 10a. That determination ignores the persistence of racially polarized voting in the State. As recently as 1983, Louisiana was ordered by a federal court to create its first majority-minority district in the New Orleans area in order to comply with the Voting Rights Act. *Major* v. *Treen*, *supra*. And based on the evidence before it, the State had every reason to believe that unless it created an additional district in which blacks constituted a majority, bloc voting by whites would preclude minority voters from having any realistic chance to elect a second representative of their choice.[3]

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[3] The district court's opinion does not address the issue of narrow tailoring. We nonetheless note that the State's plan could not be more narrowly tailored to further its compelling interests. It creates a second majority-black district in the very place in which minority voters are geographically concentrated, and it does so in a way that is consistent with the State's other redistricting interests. Nor does the plan need-

4. As already noted, there are now five decisions by three-judge courts addressing the issues raised by *Shaw*. In addition to Louisiana, the States involved are California, Georgia, Texas, and North Carolina. All of those cases involve congressional redistricting; all either have been or will be appealed to this Court. The present case raises, in a straightforward way, the most important questions left undecided by *Shaw*. It clearly warrants plenary consideration by this Court.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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SEPTEMBER 1994

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lessly pack minority voters into the district: blacks constitute 55% of the registered voters in the district, very close to the minimum percentage necessary to provide minority voters with an opportunity to elect a candidate of their choice.

APPENDIX A

[Filed Jul 29, 1994]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

No. 92-1522

RAY HAYS, ET AL., PLAINTIFFS

versus

STATE OF LOUISIANA, ET AL., DEFENDANTS

Before Wiener, Circuit Judge, Shaw, Chief District Judge and Walter, District Judge. Walter, J., Wiener and Shaw, JJ. concurring, with Shaw concurring specially with whom Wiener, J. concurs:

By order dated June 27, 1994, this case was remanded from the United States Supreme Court for further proceedings. For the following reasons, Act 1 of the Second Extraordinary Session of the 1994 Louisiana Legislature is null and void. The State of Louisiana is hereby enjoined from holding any future Congressional elections based upon the redistricting scheme embodied by Act 1.

I

STATEMENT OF THE CASE

Ray Hays, Edward Adams, Susan Singleton, and Gary Stokely ("Plaintiffs") brought this suit in state court in August 1992 challenging Act 42 of 1992. The case was removed to this Court by the State of Louisiana. After one trial and an evidentiary hearing, we struck down Act 42 as an impermissible racial gerrymander violative of Plaintiffs' equal protection rights. The State of Louisiana et al. ("Defendants") pursued their appeal directly to the Supreme Court. Meanwhile, during an extraordinary session, the Louisiana Legislature enacted Act 1, repealing Act 42 and creating a new Congressional redistricting scheme. Plaintiffs filed supplemental pleadings seeking to amend their complaint. The amended pleadings challenged Act 1 and sought injunctive relief. As the case was on appeal to the Supreme Court, the motions were returned unsigned for lack of jurisdiction. On June 27, 1994, the Supreme Court vacated our judgment of December 29, 1993; remanded the case to this Court "for further consideration in light of Act 1 of the Second Extraordinary Session of the 1994 Louisiana Legislature and the parties' filings in this Court concerning Act 1." Consistent with that order, this Court permitted the previously filed amended complaint and a two-day trial was held to determine the constitutionality of Act 1.

II

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the interest of brevity, we reiterate and adopt by reference our December 28, 1993 opinion. Our conclusions regarding Plaintiffs' standing to bring an equal protection challenge are adopted as well. With that in mind, we make the following findings:

A

"The Act (1) speaks for itself"

The districting map of Louisiana, created under Act 1, reflects a racial gerrymander. Specifically the bizarre and irregular shape of District Four raises the inference that the Louisiana Legislature classified its citizens along racial lines and segregated them into voting districts accordingly. The district cuts across historical and cultural divides, splits twelve of its fifteen parishes and divides four of the seven major cities of the State. The statistical evidence showing the racial composition of the districts further supports the finding that District Four is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." *Shaw v. Reno*, 113 S.Ct. 2816 (1993).[1] Plaintiffs, by submitting the new map with their supplemental pleadings, stated a claim upon which relief can be granted under the Equal Protection Clause. We ordered the State of Louisiana and Defendant-Intervenor United States to begin the trial by rebutting this inference.

Defendants offered the testimony of two State Senators, the State Senate's assistant secretary, a geographer, and a sociologist in an effort to explain the shape of the district on other than impermissible racial grounds. Those persons involved directly with the formation of Act 1 acknowledged that the creation of a second majority-minority district was the specific intent of the Legislature. Two race-neutral explanations were submitted by the defense. First, the geographer opined that as District Four followed the Red River valley, it endowed all its residents with a commonality of interest. Second, the various witnesses asserted that District Four was inspired by "the old Eighth" district thereby satisfying the concept of "traditional" districting principles.

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[1] The State now concedes that Act 42 was bizarre. In our opinion of December 28, 1993, we called for major surgery. Act 1 is at best a cosmetic makeover.

The starting point, following the 1990 census, was to redistrict for seven congressional districts, instead of eight, Louisiana having lost one member of Congress. Next, the State sought to comply with the Constitutional requirement of one man-one vote. In this case, each district should contain, as closely as practicable, 603,853 citizens. The State's evidence clearly shows what happened next: Misinterpreting our opinion of December 1993 as approving a racially gerrymandered district if it contained no more than 55% minority registered voters; and remaining convinced that the Department of Justice would not preclear any plan that did not contain two majority/minority districts, the Legislature embarked on an endeavor to comply with those demands and still secure adoption. These were the only inflexible features given to the cartographer/demographer in charge of generating the seven districts.

After reviewing the evidence, we find that Act 1 can only be explained credibly as the product of race-conscious decisionmaking. The Senators themselves admitted that race played a large if not dominant role in the map as it is now drawn. The Red River valley theory is clearly a *post hoc* rationalization similar to the Mississippi River theory offered to support Act 42 and equally unbelievable. The State did not imitate the "old Eighth" for tradition's sake.[2] The "old Eighth," certainly bizarre, before *Shaw* and never challenged, was crafted for the purpose of ensuring the reelection of Congressman Gillis Long. New District Four was drafted with the specific intent of ensuring a second majority-minority Congressional district. The State's purported reliance on District Four's similarity to the "old Eighth" is mere pretext. Although the witnesses highlighted other factors that carved the contours of the awkward district, the *fundamental factor driving Act 1 was race.*

B

ACT 1 IS SUBJECT TO STRICT SCRUTINY

Race-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny. This conclusion has troubled legislators, scholars, litigators, and judges alike. T. Alexander Aleinikoff, Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 Mich. L. Rev. 588, 602 ("Aleinikoff"). The problem is caused by the incomplete constitutional status of affirmative action plans in the voting rights realm. In *United Jewish Organization v. Carey*, 430 U.S. 144 (1977), the Supreme Court applied a more deferential standard to what the plurality deemed "benign" measures. One year later, the Court decided *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) following the theory that "the right not to be injured on the basis of one's skin color was a personal right secured by the Constitution, and the asserted lack of an invidious purpose could not be a sufficient reason for reducing the level of judicial scrutiny applied to measures that disadvantaged persons on the basis of race." Aleinikoff, 92 Mich. L. Rev. at 592. Eleven years later, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) confirmed the motion that, since *Bakke*, the scrutiny applied under the Fourteenth Amendment Equal Protection Clause will not vary based on the race of the preferred group. 488 U.S. at 493. *Shaw* is consistent with the more recent equal protection precedents, focusing on individual rights as opposed to *UJO*'s group-based approach. Aleinikoff, 92 Mich. L. Rev. at 600. By not overruling *UJO*, *Shaw v. Reno* can be read to ratify "the earlier group-based decisions which focus on whether electoral schemes 'dilute' the voting strength of protected minorities [while making clear] that the fact of non-dilution does not immunize districting plans from constitutional challenge." *Id.*

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[2] In fact, District Four incorporates the "old Eighth" only in part. It shoves the top further north into Shreveport, further south into Baton Rouge and shortens it to the east.

"A racial classification, despite purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts v. Feeny*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2293 (1979). Therefore, such legislation must be narrowly tailored to further a compelling government interest if it is to pass constitutional muster.

C

COMPELLING GOVERNMENTAL INTEREST

Defendants have proved no compelling governmental interest in distinguishing among citizens of

Louisiana because of their race. Defendants contend that incumbency politics, the Voting Rights Act, and remedying past legal and social or continuing social discrimination justified the racial segregation of voters. We disagree.

We note at the outset that incumbency politics cannot justify racial classifications. Adhering to federal anti-discrimination laws and remedying past or continuing discrimination could constitute compelling governmental interests if the State could "demonstrate a strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S. at 510, 109 S.Ct. at 730. Such a basis may be drawn from judicial, legislative, or administrative findings of constitutional or statutory violations.

1

Voting Rights Act

The State Legislature believed that the Voting Rights Act compelled the creation of a second majority-minority district.[3] A careful review of those statutes and the caselaw interpreting them reveals that the State's belief was misplaced.

Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the State has an affirmative duty to avoid retrogression or enactment of a plan that has the purpose or effect of denying or abridging the right to vote because of race or color. Neither the State nor the Department of Justice offered any evidence suggesting that failure to create a second majority-minority district would either be a retrogression of minority strength or have an illegal purpose or effect. Not surprisingly, we can find no support for such a claim either. Section 5 cannot be read to compel the results of Act 1.

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[3] This belief was encouraged, if not demanded, by the Department of Justice, under an actual or implied threat of withholding Section 5 pre-clearance. The shield became a sword. Whether the Attorney General had the right to withhold pre-clearance may be open to question, but she certainly had the power, and the threat, whether issued by her or some middle level bureaucrat, was a matter of real concern to the State. Litigation in the District of Columbia, and everywhere else is expensive. We hold, however, that a real concern is not a compelling one.

A Voting Rights Act Section 2 violation occurs when, under the totality of the circumstances, a State's apportionment scheme has the effect of diminishing or abridging the voting strength of a protected class. In *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986), the Supreme Court enumerated three conditions to a Section 2 "dilution" claim: (1) a numerous and compact minority, that is (2) politically cohesive, and (3) subject to majority bloc voting usually defeating the minority's preferred candidate. 438 U.S. at 50-51, 106 S.Ct. at 2766. The evidence convincingly proves that the State cannot clear the first *Gingles* hurdle.[4] Accordingly, Section 2 cannot serve as a compelling justification for Act 1. Certainly the Voting Rights Act would *permit* the creation of a second majority-minority district, but the fact that such a district is permitted does not

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[4] Despite a minority population of approximately 30%, demographic distribution is simply too diffuse (See Gov't Exhibit 2) to generate a majority voting age population in any district outside of the Orleans Parish region. The State's own expert confirmed that Louisiana's minority population is simply not sufficiently concentrated to meet *Gingles* minimum requirements.

compel its creation. *Shaw* demands that we distinguish between what the Voting Rights Act requires and what it permits. 113 S.Ct. at 2830. As for any arguments that Section 2 compels maximization of minority voting strength, the Supreme Court recently held:

> (R)eading Section 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast. . . . Failure to maximize cannot be the measure of Section 2.

Johnson v. DeGrandy, —— U.S. ——, —— S.Ct. ——, 1994 WL 285792 (1994). Hence, the State did not have a basis in law or fact to believe that the Voting Rights Act *required* the creation of two majority-minority districts.[5]

2

Remediation of Past or Present Discrimination

Defendants elicited testimony that the sordid history of unconstitutional treatment of black citizens in Louisiana prompted the State to tinker with district lines in order to ensure minority control at the polls. Using the disease as a cure is a dangerous antidote, one that must be absolutely warranted before being administered. Ironically, one witness contended that the days of "white" and "colored" water fountains and bus seats justify distinct "white" and "African-American" congressional districts. What the defense failed to establish is where the Civil Rights Act of 1964 and the Voting Rights Act of 1965 have failed to accomplish what the State now sets out to do. Without concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures, coupled with specific remedies, we cannot agree that the re-segregation of Louisiana by racially configured voting districts is warranted.[6] *Croson* and *Bakke* dictate this result.

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[5] A strong basis under *Gingles* does exist, however, to warrant the creation of a majority-minority district in the Orleans Parish region, where one has existed since 1983. *See Major v. Treen*, 574 F.Supp. 325 (E.D. La. 1983).

Finally, we refuse to accept the explanation that citizen response to issues such as education, crime and health care is driven by skin pigmentation. Legitimation of that notion would herald the demise of equal protection.

III

THE COURT'S PLAN

Our strong preference is to leave to the Legislature the task of drawing election districts. We reluctantly set our hands to the task, considering the lateness of the hour, the dismal history of the Legislature in two previous attempts, foot-dragging by the defendants in the appeals and the risk that Louisiana might be without Congressional representation in January 1995. The districts that we drew split only 6 parishes of the sixty-four, followed traditional lines, only one town of approximately 3000 was divided, and the plan met all Constitutional one man-one vote requirements. It did ignore all political considerations. And, instructed by *Gingles*, we did not carve districts along race lines, except in District 2, where the Constitution and fairness requires us to consider it.[7]

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[6] We also note, that accepting *arguendo* the remediation argument as compelling, the defendants utterly failed to demonstrate how gerrymandering could remedy the problems asserted as compelling interests. That is exactly the problem with a sweeping remedy to an amorphous concept. Without properly defining the compelling interest, it is impossible for the State to narrowly tailor any plan.

IV

CONCLUSION

The Equal Protection Clause demands strict scrutiny of government use of race as a dividing line. This is an individual right in addition to any group-based protections that the Amendment affords. When voting districts are carefully planned like racial wards, an *individual* injury occurs. All citizens are stigmatized by the notion that their "interests" can be defined by race or will be represented adequately only if a member of their racial "group" holds a particular office. To reinforce such racial notions by *operation of law* seems to fly in the face of Justice Thurgood Marshall's expressed hope in his argument in *Cooper v. Aaron* that we "learn to live together with fellow citizens, and above all to learn to obey the law."

I find a contrary position strangely at odds with the desires so eloquently voiced, not so long ago, in Shreveport, in Jackson, in Selma, in countless towns across the South, at schools and lunch counters, at voter registrar's offices. They stood there, black and white, certain in the knowledge that the Dream was coming; determined that no threat, no spittle, no blow, no gun, no noose, no *law* could separate us because of the color of our skin. To say now: "Separate!" "Divide!" "Segregate!" is to negate their sacrifice, mock their dream, deny that self-evident truth that all men are created equal and that no government may deny them the equal protection of its laws.

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[7] *See Major v. Treen, note 5 supra.*

The validity of equal protection and the systemic legitimacy of our electoral process are threatened when a State sculpts voting districts along race lines. As here, when the State cannot, or has not, offered and supported an extraordinary justification for these questionable measures, the race-conscious enactments must fall.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Civil Action Number 92-1522

RAY HAYS, ET AL., PLAINTIFFS

versus

EDWIN W. EDWARDS, in his official
capacity as Governor of the State of
Louisiana, ET AL., DEFENDANTS

SHAW, Chief District Judge, concurring:

I concur in the able opinion of the majority. It is an honest effort to provide a suitable plan for Congressional districts in Louisiana within the restraints of the Constitution. I would, however, like to add a few words which may be somewhat repetitive but which address matters in our December 28, 1993 ruling which we have adopted by reference as well as additional findings supported by the evidence. Applying the same constitutional analysis to Act 1 has led us to a similar conclusion.

Again, this Court is called upon to answer the same question: "Does a state have the *right* to create a second racial majority/minority Congressional district by racial gerrymandering?"

The United States Supreme Court has answered that question for this Court in *Shaw v. Reno*,[1] "Yes, but only if the plan is narrowly tailored to further a compelling state interest."

For the following reasons, this Court finds that the Congressional Redistricting Plan embodied in Act 1 and District 4, in particular, is the product of racial gerrymandering and is not narrowly tailored to further any compelling governmental interests. The plaintiffs' right to equal protection as guaranteed by the United States Constitution is violated by this redistricting plan, and as such, the plan is null and void.

Racial Gerrymandering

As stated in our previous opinion, racial gerrymandering is defined as the intentional segregation of voters on the basis of race. This Court is called upon to first determine whether the redistricting plan is the result of racial gerrymandering.

At trial, the witnesses for the State readily admitted that the purpose of District 4 was to create a second black majority district. The testimony of the state legislators and the State Senate Assistant Secretary confirmed that the district lines were driven by the fact that the black population in the State of Louisiana was sufficiently dispersed through the State that it was impossible to create a second majority black district without skewing the lines into a long irregular shape, as demonstrated by District 4 of the plan.

The districting plan embodied in Act 1 is highly irregular in its shape. Though it may be less bizarre than the plan created in Act 42, the physiognomy of District 4 still strongly suggests that the Legislature engaged in racial gerrymandering in creating the district. Looking at District 4 on a map of Louisiana, it appears as if someone knocked over an inkwell somewhere around Waskom, Texas, spilling ink aimlessly across the map of Louisiana. There is simply nothing regular about the contours of District 4.

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[1] 508 U.S. ——, 113 S. Ct. ——, 125 L.Ed.2d 511 (1993).

This Court acknowledges that the appearance or beauty of a district is irrelevant to a constitutional analysis; however, the irregularity in shape of a district is suspect and can indicate racial gerrymandering.

Although *Shaw* discusses the concept of bizarre or irregular shape as a means of demonstrating or inferring racial gerrymandering, the high court in no way indicated that shape alone was a determining factor in a finding of racial gerrymandering.

This Court finds, aside from the irregularity of the shape of this district, the evidence at trial clearly supported a finding of racial gerrymandering. The Louisiana Legislature abandoned traditional districting principles to arrive at a Plan which created two majority black voting districts. Act 1, like Act 42, completely disregards the traditional districting principles of compactness, respect for political subdivisions, and respect for commonality of interests.

a. Compactness

District 4, under Act 1, begins in Caddo Parish, and includes the Parishes of DeSoto, Red River, Sabine, and Natchitoches, all located in clearly defined North Louisiana, and ends in Ascension Parish, after cutting through the French region of Louisiana called "Acadiana," which includes Lafayette, St. Martin, St. Landry, and Evangeline Parishes. The district is approximately 250 miles long, and meanders through 15 parishes, making it considerably longer than any other district in the State. District 4 cuts up four major population centers of Louisiana, including Shreveport, Alexandria, Lafayette, and Baton Rouge, in its efforts to capture sufficient pockets of African-American voters, paying no respect to parish lines.[2] The district points fingers out into Caddo, Rapides, and Lafayette Parishes, while taking small bites out of St. Martin and Iberville Parishes. A district that stretches over as much territory, touching so many media and population centers, cannot be said to be compact.

b. Respect for Political Subdivisions

Although Act 1 is an improvement from Act 42, the state legislature continues to disregard the parish lines in fashioning a plan to create a second minority district.

In the creation of District 4, the State found it necessary to fragment twelve of the fifteen parishes comprising District 4, splitting sixteen parishes under the plan. District 4 is made up of pieces and parts of twelve parishes and splits four of the State's largest cities, outside of New Orleans—Shreveport, Baton Rouge, Lafayette, and Alexandria. Clearly, Act 1 has no respect for Louisiana's political subdivisions.

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[2] This court notes that District 4 covers, not only four major population centers of Louisiana, but includes four separate and major media centers of this state. Congressional candidates would be required to spend substantial amounts of money and time covering the voters in four major areas of the state.

c. Commonality of Interests

To say that District 4 comprises voters with common interests violates all traditional north-south, ethno-religious, economic and historical distinctions in Louisiana which created this State's diverse personality.

District 4 includes North Louisiana English-Scotch-Irish, mainline Protestants, South Louisiana French-Spanish-German Roman Catholics, traditional rural black Protestants, and Creoles. The district encompasses North, Central, and South Louisiana, each of which has its own unique identity, interests, culture, and history. The agricultural regions of District 4 include cotton, soybean, rice, sugar cane, and timber. Such diverse agricultural constituency have few common interests. We continue to question how one Congressional representative could adequately represent the varying interests of residents in such far-flung areas of the State.

A district which disregards commonality of interests and stretches across the State in a haphazard manner without regard to political subdivisions can only be explained as the result of racial gerrymandering.

Justification for Defendant's Plan

The State attempted to put forth a race-neutral explanation for its plan by the use of a geographer who testified that District 4 was drawn along the

Red River Valley demonstrating a commonality of interest. The State failed in its burden of proof to show that the Red River Valley region in the State of Louisiana demonstrated a commonality of interests.

Secondly, the State offered as support for its plan, that District 4 of the plan was modeled after the old eighth district in Louisiana which was created for and represented by Congressman Gillis Long.

This Court is not swayed by the assertion that the tradition of the past regarding the old eighth district is binding on this Court, due to the fact that the old eighth district was never challenged on constitutionality by any court in the United States. This Court is not called upon to determine the constitutionality of the old eighth district, and does not rely on the fact that such a district existed in Louisiana. What was done by the Louisiana Legislature in the old eighth has no application to this case before this Court, and cannot be used as a comparable for the plan before this Court.

Accordingly, this Court finds that the only explanation of the State's Redistricting Plan was racial gerrymandering. The State intentionally segregated voters into Congressional districts on the basis of race, in order to intentionally create a second black majority voting district.

Narrowly Tailored

A racially gerrymandered plan is subject to strict scrutiny, and as such it violates the Equal Protection Clause of the Fourteenth Amendment unless it is narrowly tailored to further a compelling governmental interest.

Compelling Governmental Interest

Again, the State advances two possible compelling state interests to justify their racial gerrymandering: (1) compliance with the Voting Rights Act, and (2) remedying the effects of past discrimination.

a. Compliance with the Voting Rights Act

Section 5 of the Voting Rights Act provides that a state has an affirmative duty to avoid retrogression or to avoid enactment of a plan that has the purpose or effect of denying or abridging the right to vote on account of race.

The defendants established that the Louisiana Legislature was operating under the belief that a second majority-black district was mandated by the Department of Justice to avoid retrogression, and obtain preclearance. Without commenting further regarding the role of the Department of Justice in affecting the plan enacted in Act 1, this Court finds no evidence to support a finding that a second majority-black district is required by Section 5 of the Voting Rights Act, to avoid retrogression. Prior to the census, Louisiana's Congressional delegation had only one black representative out of eight congressmen. Certainly, one congressman out of seven cannot constitute retrogression. Section 5 of the Voting Rights Act does not constitute a compelling governmental interest in this case.

Additionally, Section 2 of the Voting Rights Act prohibits a plan that has the effect of diminishing or abridging the voting strength of a protected class.

However, this claim must fall in the face of the Supreme Court's ruling in *Thornburg v. Gingles.*[3]

This Court finds that Section 2 of the Voting Rights Act is not implicated by this plan. Although the Voting Rights Act would permit a second minority district, such a district is not compelled by the Act.

b. Remedy Past Discrimination

The State advanced, as justification for its racially gerrymandered district, the belief that the creation of a second minority district in Louisiana is mandated to remedy the past discrimination which has existed in Louisiana.

This Court struggled with the concept of how to define "past discrimination" in Louisiana. Certainly, the history of Louisiana, as of most states in the deep South with respect to its treatment of blacks, is indelibly imprinted in our memories. This State, having inflicted great atrocities against minorities, has made great strides in remedying past discrimination, being ever vigilant of its current existence in the attitudes of many of its residents today. Louisiana, in the sense of its history, will always have a history of past discrimination. However, this Court must determine whether this State has a history of past legal discrimination in the voting laws and procedures which compels it to make reparations and remediation.

The Civil Rights Act of 1964 and the Voting Rights Act of 1965 have mandated the elimination of obstacles to minority participation at the polls. Since those turbulent times in Louisiana, and through the efforts of many black and white leaders in this State, we have seen the elimination of poll taxes, literacy tests, and violence to reduce or prohibit African-American participation in our elections process. Louisiana has minority representation in nearly every level of government, in almost every area of the State. Speaking only in the sense of the voting rights of minorities in Louisiana, this Court finds that there exist no significant obstacles for minorities in this State to participate in the elections process which have not been remedied by the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Accordingly, the concept of remedying past discrimination is not a compelling governmental interest in the recent history of Louisiana in the area of voting rights.

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[3] 478 U.S. 30, 106 S. Ct. 2752 (1986).

This Court acknowledges the great benefits that are derived by an increase in minority representation in government, not only for those who are represented but also to the process of government itself. Given the opportunity to serve, minorities have shown that they perform admirably. A greater number of African-American leaders in the government process not only provide positive role models for all black citizens, but their efforts in government will insure that the legal obstacles to minority advancement in all areas of life will be eliminated. However, to disregard the rights of all citizens of the State of Louisiana would violate the Equal Protection Clause of the United States Constitution, and such a plan would do further violence to the ultimate goal of a colorblind system.

Although we found that the evidence presented at the hearing did not support the contention that the

Legislature was operating pursuant to a compelling state interest, even if there had been satisfactory evidence at trial that there is a compelling state interest in creating a second majority-minority Congressional district, the plan embodied by Act 1 was not narrowly tailored to effect that interest. The fact that outside of the Orleans Parish area, the minority black population is relatively dispersed throughout the rest of the State, elicited the question of whether it was even possible to develop a districting plan that creates a second majority-minority district *and* is narrowly tailored, in the sense that the plan in total does not unduly burden the rights of third parties.

The Court Imposed Plan

This Court, with the assistance and guidance of our appointed special master, devised a Congressional Districting Plan. This plan was created from a computer program which included the demographics of the State of Louisiana. This Court started with the goal of creating seven Congressional districts, remaining true to the "one man, one vote" requirement, and the constraints of *Shaw* and *Gingles*.

After considering every combination available, this Court reached the conclusion that the diffused population of black voters in Louisiana, outside of District 2, makes it impossible to draw a Congressional plan which contains two minority-majority districts and passes constitutional muster. Act 1 clearly does not.

Conclusion

While this Court finds that the creation of a second minority-majority district in Louisiana is permissive and advantageous, we do not find it compelling, under the constraints of the Constitution.

This Court applauds the Louisiana Legislature in its efforts to create a second minority district; however, such efforts run aground of the Constitution and the dictates of *Shaw v. Reno*.

APPENDIX B

[Filed Jul. 25, 1994]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Civil Action No. CV 92-1522S

RAY HAYS, ET AL., PLAINTIFFS

versus

EDWIN W. EDWARDS, in his official
capacity as Governor of the State of
Louisiana, ET AL., DEFENDANTS

ORDER

IT IS ORDERED that Plaintiffs' Motion for Judgment as a Matter of Law be and it is hereby GRANTED.

IT IS FURTHER ORDERED that Act 1 of the Second Special Session of the 1994 Louisiana Legislature (the Act) is unconstitutional, in that it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and the redistricting plan embodied in the Act is null and void.

IT IS FURTHER ORDERED that the State of Louisiana is permanently enjoined from holding any elections under the Act.

IT IS FURTHER ORDERED that, although we do not invalidate the 1992 congressional elections, the term of office of each member of the United States House of Representatives from Louisiana who represents a district created under the plan in Act 42 of 1992 of the State of Louisiana, and each district created under such plan, shall expire, *ipso facto*, at noon on the 3rd day of January, 1995, and such terms of office and such districts shall not be extended or carried over into the next Congress in any manner whatsoever.

IT IS FURTHER ORDERED that a congressional redistricting plan for the State of Louisiana is hereby provided, as set forth in Appendix A, on the basis of which all congressional elections for the seven (7) United States Representatives from the State of Louisiana to the One Hundred Fourth Congress shall be conducted, with the dates for qualifying and for holding such elections to be established by the cognizant officials of the State of Louisiana according to law; and that all subsequent elections of United States Representatives from the State of Louisiana shall be conducted under the plan provided by this court until and unless a congressional districting plan enacted by the State of Louisiana according to law is submitted to this court and is determined by it to be constitutionally valid.

IT IS FURTHER ORDERED that, as prevailing parties in all phases of this case to date, the Plaintiffs are entitled to recover all reasonable costs, attorneys' fees and expenses, including reasonable expert witness fees, pursuant to 42 U.S.C. 1988, in amounts to be determined by reference to United States Magistrate Judge Roy S. Payne for review and recommendations; provided, however, that such determination shall not prevent this Order from becoming final immediately upon its being filed.

This court reserves the right to issue, and intends to issue, a memorandum opinion consistent with this Order.

FOR THE COURT:

/s/ Donald E. Walter
DONALD E. WALTER
District Judge

[Judgment Entered 7-26-94]

LOUISIANA CONGRESSIONAL DISTRICTS

The State of Louisiana is divided into the following seven Congressional Districts:

DISTRICT 1

District 1 is composed of Precincts 3-G, 5-G, 8-G, 9-G, 10-G, 1-H, 2-H, 3-H, 4-H, 5-H, 6-H, 7-H, 8-H, 9-H, 1-K, 2-K, 3-K, 4-K, 5-K, 6-K, 7-K, 8-K, 9-K, 10-K, 11-K, 12-K, 13-KA, 15-K, 16-K, 17-K, 18-K, 19-K, 20-K, 25-K, 27-K, 28-K, 34-K, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 132, 134, 135, 136, 137, 170, 171, 174B, 175, 176, 177, 178, 182, 183, 184, 185, 193, 194A, 195, 210, 211, 225, 226, 227, 228, 229, 230, 231, and 234 of Jefferson Parish; Precincts 3-20, 4-8, 4-9, 4-10, 4-10A, 4-11, 4-12, 4-13, 4-13A, 4-14, 4-14A, 4-15, 4-16, 4-16A, 4-17, 4-17A, 4-18, 4-18A, 4-19, 4-20, 4-20A, 4-21, 4-21A, 4-22, 4-23, 5-12, 5-13, 5-14, 5-15, 5-16, 5-17, 5-18, 5-19, 7-33A, 7-40, 7-41, 7-42, 12-4, 13-1, 14-1, 14-2, 14-3, 14-4, 14-8, 14-9, 14-10, 14-11, 16-2, 17-1, 17-17, 17-18, 17-18A, 17-18B, 17-19, 17-19A, 17-20, and 17-21 of Orleans Parish; St. Tammany Parish; Tangipahoa Parish; and Washington Parish.

DISTRICT 2

District 2 is composed of Precincts 1-G, 2-G, 4-G, 6-G, 7-G, 11-G, 13-KB, 14-K, 21-K, 22-K, 23-K, 24-K, 26-K, 29-K, 30-K, 31-K, 32-K, 33-K, 1-W, 2-W, 3-W, 4-W, 5-W, 6-W, 7-W, 8-W, 9-W, 104, 107, 115, 131, 133, 138, 150, 151, 152, 153, 154, 155, 156, 157A, 157B, 172, 173, 174A, 179A, 179B, 180, 181, 186, 187, 188, 189, 190, 191, 192, 194B, 196, 197, 198, 212, 213A, 213B, 213C, 214, 215, 232, 233, 235, 236, 237, 246A, and 246B of Jefferson Parish and Precincts 1-1, 1-2, 1-5, 1-6, 1-7, 2-1, 2-2, 2-3, 2-4, 2-5, 2-6, 2-6A, 2-7, 3-1, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8, 3-9, 3-10, 3-12, 3-13, 3-14, 3-15, 3-16, 3-17, 3-18, 3-19, 4-2, 4-3, 4-4, 4-5, 4-6, 4-7, 5-1, 5-2, 5-3, 5-4, 5-5, 5-6, 5-7, 5-8, 5-9, 5-10, 5-11, 6-1, 6-2, 6-4, 6-5, 6-6, 6-7, 6-8, 6-9, 7-1, 7-2, 7-4, 7-4A, 7-5, 7-6, 7-7, 7-8, 7-9, 7-9A, 7-10, 7-11, 7-12, 7-13, 7-14, 7-15, 7-16, 7-17, 7-18, 7-19, 7-20, 7-20A, 7-21, 7-22, 7-23, 7-24, 7-25, 7-25A, 7-26, 7-26A, 7-27, 7-27A, 7-27B, 7-28, 7-28A, 7-29, 7-30, 7-31, 7-32, 7-33, 7-34, 7-35, 7-36, 7-36A, 7-37, 7-37A, 7-38, 7-38A, 7-39, 8-1, 8-2, 8-4, 8-5, 8-6, 8-7, 8-8, 8-9, 8-10, 8-11, 8-12, 8-13, 8-14, 8-15, 8-16, 8-17, 8-18, 8-19, 8-20, 8-21, 8-22, 8-23, 8-24, 8-25, 8-25A, 8-26, 8-26A, 8-27, 8-27A, 8-28, 8-29, 8-30, 9-1, 9-2, 9-3, 9-3A, 9-3B, 9-4, 9-5, 9-5A, 9-6A, 9-6B, 9-6C, 9-6D, 9-6E, 9-6F, 9-7, 9-8, 9-8A, 9-8B, 9-9, 9-10, 9-11, 9-12, 9-13, 9-14, 9-15, 9-16, 9-17, 9-18, 9-19, 9-20, 9-21, 9-22, 9-23, 9-24, 9-25, 9-25A, 9-26, 9-26A, 9-27, 9-28, 9-28A, 9-28B, 9-28C, 9-28D, 9-28E, 9-28F, 9-29, 9-29A, 9-30, 9-30A, 9-31, 9-31A, 9-31B, 9-31C, 9-31D, 9-31E, 9-32, 9-33, 9-33A, 9-34, 9-34A, 9-35, 9-35A, 9-36, 9-36A, 9-36B, 9-36C, 9-37, 9-37A, 9-38, 9-38A, 9-38B, 9-39, 9-39A, 9-39B, 9-40, 9-40A, 9-40B, 9-40C, 9-41, 9-41A, 9-41B, 9-41C, 9-41D, 9-42, 9-42A, 9-42B, 9-42C, 9-42D, 9-42E, 9-43, 9-43A, 9-43B, 9-43C, 9-43D, 9-43E, 9-43F, 9-43G, 9-43H, 9-43I, 9-43J, 9-43K, 9-43L, 9-43M, 9-43N, 9-44, 9-44A, 9-44B, 9-4C, 9-44D, 9-44E, 9-44F, 9-44G, 9-44H, 9-44I, 9-44J, 9-44K, 9-44L, 9-44M, 9-44N, 9-44O, 9-44P, 9-44Q, 9-45, 9-45A, 10-3, 10-4, 10-5, 10-6, 10-7, 10-8, 10-9, 10-10, 10-11, 10-12, 10-13, 10-14, 11-1, 11-2, 11-3, 11-4, 11-5, 11-6, 11-7, 11-8, 11-9, 11-10, 11-11, 11-12, 11-13, 11-14, 11-15, 11-16, 11-17, 11-18, 11-19, 12-1, 12-2, 12-3, 12-5, 12-6, 12-7, 12-8, 12-9, 12-10, 12-11, 12-12, 12-13, 12-14, 12-15, 12-16, 12-17, 12-18, 12-19, 12-20, 13-2, 13-3, 13-4, 13-5, 13-6, 13-7, 13-8, 13-9, 13-10, 13-11, 13-12, 13-13, 13-14, 13-14A, 13-15, 13-16, 14-5, 14-6, 14-7, 14-12, 14-13, 14-13A, 14-14, 14-15, 14-16, 14-17, 14-18, 14-18A, 14-19, 14-20, 14-21, 14-22, 14-23, 14-24, 14-24A, 14-25, 14-26, 14-26A, 15-1, 15-2, 15-3, 15-4, 15-5, 15-6, 15-7, 15-8, 15-9, 15-10, 15-11, 15-11A, 15-12, 15-12A, 15-13, 15-13A, 15-13B, 15-14, 15-14A, 15-14B, 15-14C, 15-14D, 15-14E, 15-14F, 15-14G, 15-15, 15-15A, 15-15B, 15-16, 15-17, 15-17A, 15-17B, 15-18, 15-18A, 15-18B, 15-18C, 15-18D, 15-18E, 5-18F, 15-19, 15-19A, 15-19B, 15-19C, 16-1, 16-1A, 16-3, 16-4, 16-5, 16-6, 16-7, 16-8, 16-9, 17-2, 17-3, 17-4, 17-5, 17-6, 17-7, 17-8, 17-9, 17-10, 17-11, 17-12, 17-13, 17-13A, 17-14, 17-15, and 17-16 of Orleans Parish.

DISTRICT 3

District 3 is composed of Precints 13, 14, 15, 16A & 16B, 27A, 27B, 28, 29, 31, 32, 33, 34, 35A, 35B, 36, 37, 40, 41, and 42 of Ascension Parish; Assumption Parish; Iberia Parish; Precinct 1-GI, 1-LA, 1-LB, 2-L, 216, 217, 238, 247, 248, 249, and 250 of Jefferson Parish; Lafourche Parish; Plaquemines Parish; St. Bernard Parish; St. Charles Parish; St. James Parish; St. John the Baptist Parish; Precincts 1-1, 1-2, 1-3, 1-4, 1-5, 1-6, 1-7, 2-1 & 2-3, 2-2, 2-4, 3-1, 3-2, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8, 3-9, 4-1, 4-2, 4-3, 4-4, 4-5, 4-6, 5-1, 5-2, 5-3 & 5-4, 6-1, 6-2, 6-3, 6-4, 7-1, 7-2, 7-3, 7-4, 8-1, 8-2, 8-3, 8-4, 9-1, 9-4, and 9-5 of St. Martin Parish; St. Mary Parish; and Terrebonne Parish.

DISTRICT 4

District 4 is composed of Precincts 1-1, 1-3, 1-4, 1-6, 1-7, 2-6-0, 3-1, 4-1, 4-2, 4-3, 5-2, 5-2A*, 5-5, and 5-10 of Allen Parish; Beauregard Parish; Bienville Parish; Bossier Parish; Caddo Parish; Claiborne Parish; De Soto Parish; Natchitoches Parish; Red River Parish; Sabine Parish; Vernon Parish; and Webster Parish.

DISTRICT 5

District 5 is composed of Avoyelles Parish; Caldwell Parish; Catahoula Parish; Concordia Parish; East Carroll Parish; Precincts 1-2, 1-13-0, 1-13-1, 4-1-2R, 4-1-3R, 4-1C, 4-2-0, 4-2-1, 4-3, 4-4, 5-1, 5-2-0, 5-2-1, 5-2-2, 5-3, 5-4C, 5-4R, and 5-5 of Evangeline Parish; Franklin Parish; Grant Parish; Jackson Parish; La Salle Parish; Lincoln Parish; Madison Parish; Morehouse Parish; Ouachita Parish; Rapides Parish; Richland Parish; Tensas Parish; Union Parish; West Carroll Parish; and Will Parish.

DISTRICT 6

District 6 is composed of Precincts 1, 2A & B, 3, 4A, 4B, 5A, 5B, 6, 7A, 8A & 8B, 9, 10A & 10B, 11A & 11B, 12, 21A & 21B, 22A, 22B, and 23 of Ascension

Parish; East Baton Rouge Parish; East Feliciana Parish; Iberville Parish; Livingston Parish; Pointe Coupee Parish; St. Helena Parish; West Baton Rouge Parish; and West Feliciana Parish.

DISTRICT 7

District 7 is composed of Acadia Parish; Precincts 1-2, 1-5, 2-1, 2-2-C, 2-2-O, 2-3, 2-4-C, 2-4-O, 2-5, 2-6-C, 3-2, 5-1, 5-3, 5-3A*, 5-4-C 5-4-O, 5-4-X*, 5-4-Y*, 5-6, 5-7, 5-8, 5-8A*, 5-9, 5-11, 5-12 and 5-13 of Allen Parish; Calcasieu Parish; Cameron Parish; Precincts 1-1, 1-3, 1-4-0R, 1-4-1R, 1-4C, 1-5-0, 1-5-1, 1-6, 1-7, 1-8-0, 1-8-1, 1-8-2, 1-9-0C, 1-9-1C, 1-9-2-C, 1-9-3C, 1-9R, 1-10-0, 1-10-1, 1-11, 1-12, 1-14, 1-15, 1-16, 1-17-0R, 1-17-1R, 1-17C, 1-18-0C, 1-18-1C, 1-18R, 1-19, 2-1, 2-2, 2-3, 2-4, 2-5, 3-1-0, 3-1-1, 3-2-0, 3-2-1, 3-2-2, 3-3, 3-4, 3-5, 3-6-0, 3-6-1, 3-6-2, 3-7, 3-8, 4-1-0R, and 4-1-1R of Evangeline Parish; Jefferson Davis Parish; Lafayette Parish; St. Landry Parish; Precincts 9-2, and 9-3 of St. Martin Parish; and Vermilion Parish.

The precincts enumerated herein are the precincts existing on April 17, 1994 established by the respective parish governing authority and used by the Louisiana Legislature in Act 1 of the Second Extraordinary Session of 1994.

DB: LA SEN 1994

Congressional District Statistics
Total Population

District Name	Number Members	Total Population	Ideal Population	District Variance	% District Variance
District 1	1	602,842	602,853	−11	0.00%
District 2	1	602,877	602,853	24	0.00%
District 3	1	602,839	602,853	−14	0.00%
District 4	1	602,876	602,853	23	0.00%
District 5	1	602,933	602,853	80	0.01%
District 6	1	602,774	602,853	−79	−0.01%
District 7	1	602,832	602,853	−21	0.00%

PLANWIDE STATISTICS:

Range of populations:	602,774 to 602,933
Ratio range:	1.0003
Absolute range:	−79 to 80
Absolute overall range:	159
Relative range:	−0.01 to 0.01%
Relative overall range:	0.03%
Absolute mean deviation:	36.00
Relative mean deviation:	0.01%

DB: LA SEN 1994

Congressional District Summary
Total Population and 1994 Registered Voters

District Name	Total Pop.	Total White	Total Black	Total Reg. Vot.	Reg. Wh.	Total Reg. Blk.
District 1	602,842 100.00%	515,665 85.54%	72,979 12.11%	332,945 100.00%	296,205 88.97%	32,354 9.72%
District 2	602,877 100.00%	215,630 35.77%	365,874 60.69%	292,713 100.00%	110,239 37.66%	176,552 60.32%
District 3	602,839 100.00%	443,616 73.59%	142,167 23.58%	330,048 100.00%	250,432 75.88%	76,915 23.30%
District 4	602,876 100.00%	397,629 65.96%	195,980 32.51%	299,652 100.00%	214,031 71.43%	82,876 27.66%
District 5	602,933 100.00%	410,725 68.12%	187,223 31.05%	333,182 100.00%	239,419 71.86%	92,379 27.73%
District 6	602,774 100.00%	402,995 66.86%	191,421 31.76%	332,407 100.00%	238,560 71.77%	91,507 27.53%
District 7	602,832 100%	452,878 75.13%	143,637 23.83%	336,429 100.00%	258,583 76.86%	76,329 22.69%
Total	4,219,973 100.00%	2,839,138 67.28%	1,299,281 30.79%	2,257,376 100.00%	1,607,469 71.21%	628,912 27.86%

DB: LA SEN 1994

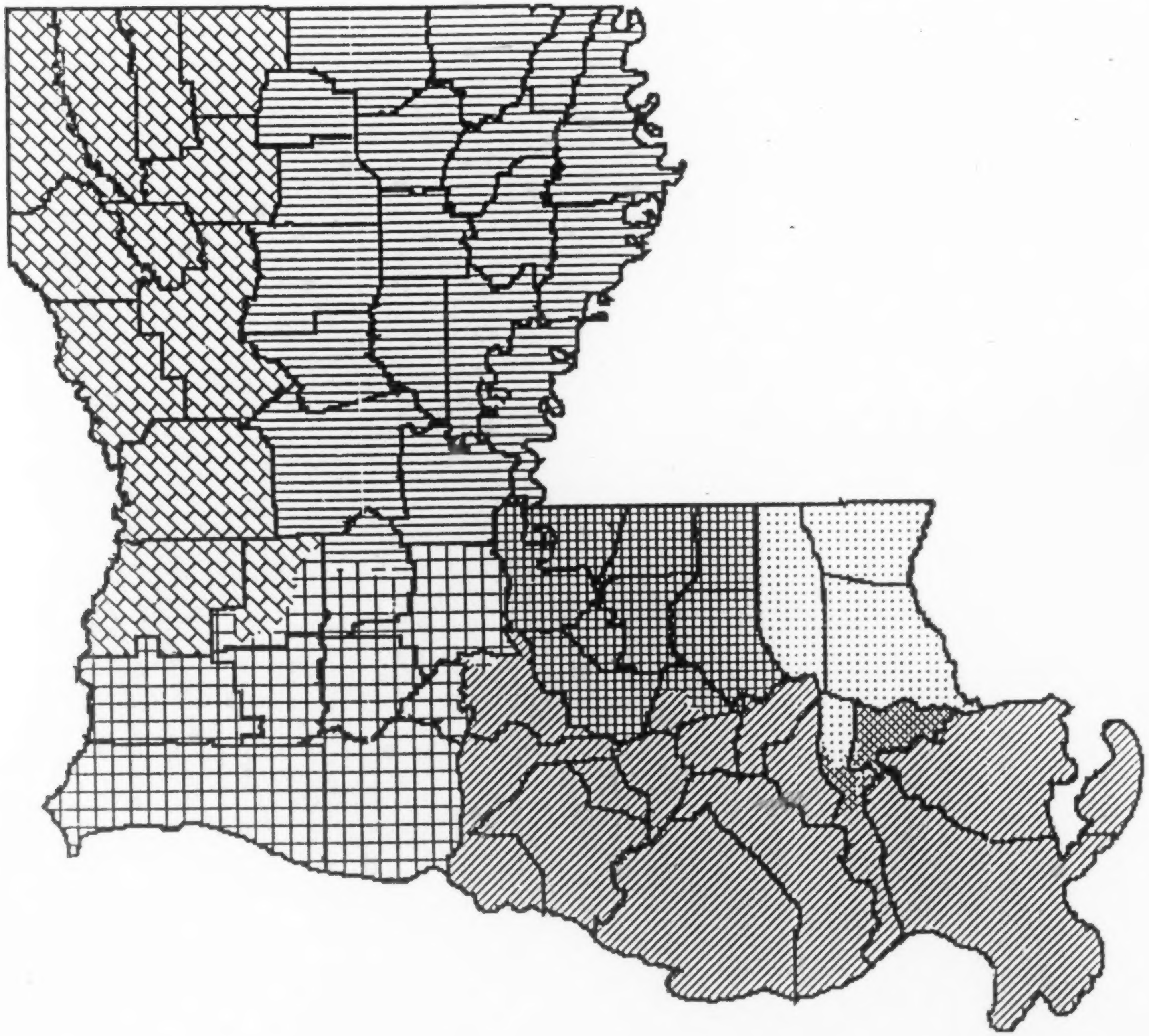
Parish Population by Congressional District
Total Population and 1994 Registered Voters

Census Unit	Total Pop.	Total White	Total Black	Total Reg. Vot.	Total Reg. Wh.	Total Reg. Blk.
District 1						
Jefferson Parish	289,679	261,785	16,940	153,838	145,986	5,351
Orleans Parish	39,761	36,804	2,219	26,264	24,516	1,318
St. Tammany Parish	144,508	126,806	15,917	82,209	73,706	7,225
Tangipahoa Parish	85,709	60,601	24,527	45,988	34,015	11,831
Washington Parish	43,185	29,669	13,376	24,646	17,982	6,629
Total District 1	602,842	515,665	72,979	332,945	296,205	32,354
District 2						
Jefferson Parish	145,700	78,880	60,365	63,586	36,331	25,897
Orleans Parish	457,177	136,750	305,509	229,127	73,908	150,655
Total District 2	602,877	215,630	365,874	292,713	110,239	176,552
District 3						
Ascension Parish	21,079	10,831	10,107	13,202	7,186	5,983
Assumption Parish	22,753	15,273	7,349	13,823	9,411	4,410
Iberia Parish	68,297	46,940	20,154	38,442	27,371	10,951
Jefferson Parish	12,927	10,505	1,737	6,940	6,011	737
Lafourche Parish	85,860	72,371	10,703	43,794	39,464	4,243
Plaquemines Parish	25,575	18,522	5,944	14,589	10,454	3,137
St. Bernard Parish	66,631	62,199	3,111	39,195	37,308	1,754
St. Charles Parish	42,437	31,638	10,253	25,533	19,315	6,184

St. James Parish	20,879	10,484	10,357	13,676	7,093	6,567
St. John the Baptist Parish	39,996	25,039	14,419	22,263	13,593	8,580
St. Martin Parish	41,337	27,044	13,664	24,405	16,495	7,850
St. Mary Parish	58,086	37,688	18,337	30,986	21,270	9,508
Terrebonne Parish	96,982	75,082	16,032	43,200	35,461	7,011
Total District 3	602,839	443,616	142,167	330,048	250,432	76,915
District 4						
Allen Parish	7,050	6,049	972	4,794	4,114	663
Beauregard Parish	30,083	25,242	4,489	16,481	14,255	2,125
Bienville Parish	15,979	8,986	6,949	9,883	5,606	4,270
Bossier Parish	86,088	67,030	17,381	39,519	33,037	6,146
Caddo Parish	248,253	146,580	99,511	123,515	81,992	40,524
Claiborne Parish	17,405	9,313	8,041	9,228	5,348	3,871
De Soto Parish	25,346	14,003	11,141	14,403	8,429	5,489
Natchitoches Parish	36,689	22,357	13,779	20,534	13,096	7,146
Red River Parish	9,387	5,752	3,589	5,997	3,848	2,144
Sabine Parish	22,646	17,939	3,984	13,586	11,310	2,206
Vernon Parish	61,961	45,828	12,867	20,275	17,723	2,135
Webster Parish	41,989	28,550	13,277	21,437	15,273	6,157
Total District 4	602,876	397,629	195,980	299,652	214,031	82,876
District 5						
Avoyelles Parish	39,159	28,324	10,585	23,253	17,472	5,729
Caldwell Parish	9,810	7,970	1,760	6,397	5,357	1,031
Catahoula Parish	11,065	8,136	2,874	7,573	5,738	1,822
Concordia Parish	20,828	13,164	7,596	12,063	7,868	4,184
East Carroll Parish	9,709	3,355	6,291	5,774	2,303	3,436
Evangeline Parish	6,405	5,776	613	4,234	3,858	371

Census Unit	Total Pop.	Total White	Total Black	Total Reg. Vot.	Total Reg. Wh.	Total Reg. Blk.
Franklin Parish	22,387	15,278	7,040	13,240	9,682	3,549
Grant Parish	17,526	14,860	2,540	10,566	9,015	1,523
Jackson Parish	15,705	11,065	4,589	9,297	6,663	2,620
La Salle Parish	13,662	12,271	1,257	10,185	8,748	1,324
Lincoln Parish	41,745	24,620	16,590	20,477	12,814	7,450
Madison Parish	12,463	4,961	7,415	7,834	3,597	4,207
Morehouse Parish	31,938	18,584	13,263	17,008	10,816	6,178
Ouachita Parish	142,191	96,870	44,096	70,344	51,233	18,890
Rapides Parish	131,556	92,989	36,805	68,931	51,287	17,105
Richland Parish	20,629	13,020	7,539	11,586	7,835	3,726
Tensas Parish	7,103	3,292	3,785	4,503	2,217	2,283
Union Parish	20,690	14,850	5,767	12,816	9,449	3,347
West Carroll Parish	12,093	9,997	2,020	6,808	5,809	986
Winn Parish	16,269	11,343	4,798	10,844	6,129	3,804
Total District 5	602,933	410,725	187,223	333,182	239,419	92,379
District 6						
Ascension Parish	37,135	33,649	3,161	21,626	20,151	1,402
East Baton Rouge Parish	380,105	240,614	132,328	199,491	139,379	58,868
East Feliciana Parish	19,211	10,022	9,083	10,844	6,129	1,804
Iberville Parish	31,049	16,519	14,385	20,020	10,953	9,058
Livingston Parish	70,526	66,269	3,920	40,589	38,303	2,232
Pointe Coupee Parish	22,540	13,196	9,275	14,550	8,899	5,644
St. Helena Parish	9,874	4,725	5,127	7,834	3,831	3,996
West Baton Rouge Parish	19,419	12,329	6,993	11,645	7,473	4,154
West Feliciana Parish	12,915	5,672	7,149	5,808	3,442	2,349
Total District 6	602,774	402,995	191,421	332,407	238,560	91,507

District 7						
Acadia Parish	55,882	45,532	10,179	32,718	26,875	5,817
Allen Parish	14,176	10,259	3,524	8,177	6,126	1,896
Calcasieu Parish	168,134	128,181	38,445	84,484	66,510	17,423
Cameron Parish	9,260	8,685	503	6,125	5,776	342
Evangeline Parish	26,869	18,629	8,088	17,546	12,336	5,193
Jefferson Davis Parish	30,722	24,721	5,836	17,704	14,562	3,116
Lafayette Parish	164,762	125,340	36,846	89,258	70,268	18,467
St. Landry Parish	80,331	47,532	32,392	48,634	28,873	19,638
St. Martin Parish	2,641	1,762	868	1,498	1,021	474
Vermilion Parish	50,055	42,237	6,956	30,285	26,236	3,963
Total District 7	602,832	452,878	143,637	336,429	258,583	76,329



APPENDIX C

[Filed Dec. 28, 1993]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

No. 92-CV-1522

RAY HAYES, ET AL., PLAINTIFFS

versus

STATE OF LOUISIANA, ET AL., DEFENDANTS

Before WIENER, Circuit Judge, SHAW, Chief District Judge, and WALTER, District Judge.

MEMORANDUM OPINION

WIENER, Circuit Judge:

Plaintiffs Ray Hayes, et al. (Plaintiffs) challenge the congressional redistricting plan (the Plan) adopted by the Louisiana State Legislature (the Legislature) when, following the 1990 census, it enacted Act 42 of 1992 (Act 42).[1] In its present pos-

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[1] A technical distinction can be drawn between the terms "apportionment" and "reapportionment," on the one hand, and "districting" and "redistricting" on the other:

> *apportionment* and *reapportionment* involve the allocation [by Congress] of a finite number of representatives

ture, this case considers the constitutionality of the Plan, admittedly designed *inter alia* to increase the number of black representatives in Louisiana's congressional delegation from one out of eight to two out of seven. The Plaintiffs insist that the Plan accomplishes this result by employing impermissible racial gerrymandering to create a new majority-black voting district, thereby violating the Equal Protection Clause of the United States Constitution.

In simplest form, this case poses the question, "Does a state have the *right* to create a racial majority-minority congressional district by racial gerrymandering?" In simplest form, the answer—largely supplied by the United States Supreme Court's opinion in *Shaw v. Reno* [2], rendered during the pendency of this case—is "Yes, but only if the state does it *right*."

Finding that the Plan in general and Louisiana's Congressional District 4 in particular are products of racial gerrymandering and are *not* narrowly tailored to further any compelling governmental interest, we continue that the Legislature did not "do it right." We hold, therefore, that Plaintiffs' right to equal protection as guaranteed by the U.S. Constitution is

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> among a fixed number of pre-established areas. *Districting* and *redistricting* . . . refer to the process by which the lines separating legislative districts are drawn [by states].

See Major v. Treen, 574 F. Supp. 325, 328 (E.D. La. 1983) (quoting Backstrom et al., *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 Min. L. Rev. 1121, 1121 n.1 (1978). For simplicitly, however, we use both terms interchangeably.

[2] *Shaw v. Reno*, 508 U.S. ——, 113 S. Ct. ——, 125 L. Ed. 2d 511 (1993).

violated by the Plan. Consequently, we declare Act 42 of 1992 to be unconstitutional and the redistricting plan embodied therein to be null and void; enjoin the State of Louisiana from holding any future congressional elections based on the Plan; and, although we do not invalidate the 1992 congressional elections held thereunder, hold that the term of office of each member of the United States House of Representatives from Louisiana who represent a district created under the Plan shall expire, *ipso facto*, at noon on the 3rd day of January, 1995,[3] such terms of office not to be extended or carried over into the next Congress in any manner whatsoever.

I

STATEMENT OF THE CASE

The Plan comprises five majority-white districts (Districts 1, 3, 5, 6 & 7) and two majority-black districts (Districts 2 and 4).[4] District 2 has a minority voting age population of 56%, while District 4 has a minority voting age population of 63%. New District 2 covers essentially the same geographic area as did old District 2 in the previous plan: almost the entire population of Orleans Parish and roughly one-third of the population of Jefferson Parish. District 2 is not challenged in the instant lawsuit, nor elsewhere to our knowledge. Rather, District 4, appearing for the first time in Act 42, is the primary focus of this constitutional challenge.

Shortly after the enactment of Act 42, the Plaintiffs filed this suit seeking to have 1) the Plan declared unlawful, 2) the Defendants enjoined from using the Plan in the impending congressional elections, 3) the Legislature ordered to create a new plan that would not segregate state residents into voting districts on the basis of race, and 4) the Defendants preliminarily enjoined "from taking any action in preparation for the primary or general elections for the U.S. House of Representatives . . . ." In their complaint the Plaintiffs—who are black, white, and Asian residents of either District 4 or District 6—allege that the Plan violates Section 3 of the Louisiana State Constitution, Section 2 of the Voting Rights Act, and the Fifth, Fourteenth and Fifteenth Amendments of the United States Constitution.

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[3] *See* U.S. Const. amend. XX, § 1.

[4] *See* Table, Appendix A.

As required by the Voting Rights Act, the chief judge of the United States Court of Appeals for the Fifth Judicial Circuit appointed the instant panel to hear this case. It was tried on August 26 and 27, 1992 (the Trial). At the conclusion of the Trial, we issued an interlocutory Memorandum Ruling and Order (the 1992 Order) in which we denied Plaintiffs' request for an injunction, allowed the 1992 Congressional elections to go forward under the Plan, refused to consider Plaintiffs' state and federal constitutional claims, and took Plaintiffs' Voting Rights Act claims under advisement. We also requested post-trial briefing on the question whether the Plan dilutes the voting strength of either blacks or whites in contravention of the Voting Rights Act.

Being aware of an essentially identical case originating in North Carolina—now known as *Shaw v. Reno*—which had progressed further than had the instant case, we held this one under submission until the results of *Shaw* became known. On June 29, 1993, the Supreme Court rendered its decision in

Shaw, profoundly affecting this case and similar ones pending in other states. We requested the parties and invited amici curiae to file supplemental briefs, generally discussing the implications of *Shaw* and specifically addressing whether—in the terminology of *Shaw*—the Plan was "narrowly tailored to further a compelling government interest." In August 1993, we held two additional days of trial (the Evidentiary Hearing) to assist us in determining whether the Plan is in fact the product of racial gerrymandering, and, if so, whether it should nonetheless be sustained because it is narrowly tailored to further a compelling state interest.

II

PRELIMINARY LEGAL MATTERS

A. *Standing*

Early in this case Defendants suggested that the white Plaintiffs intrinsically lack standing to challenge the Plan. The Defendants evidently believe that only historically disadvantaged minorities have standing to attack state laws that separate citizens on the basis of race. But that is not the case.

In *Shaw*, the Supreme Court reaffirmed the important principle "that equal protection analysis is not dependent on the race of those benefited or burdened by a particular classification."[5] "The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: 'No state shall . . . deny to *any person* within its jurisdiction the equal protection of the laws.' The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[6] White citizens thus clearly have standing to challenge redistricting plans under the Equal Protection Clause of the Fourteenth Amendment, just as do black citizens, Hispanic citizens, Asian citizens, Native American citizens, and citizens of any other race. We reject out of hand the implication that, although all are equal under the law, "some . . . are more equal than others."[7]

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[5] *Id.* at 531 (citing *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 494, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) (internal quotations omitted).

B. *Survival of Plaintiffs' Equal Protection Claim*

The Defendants assert that the Plaintiffs' equal protection claim does not conform to the structure of the argument approved by the Court in *Shaw* and, consequently, that the Plaintiffs fail to state an equal protection claim under *Shaw*. The Defendants also argue that our 1992 Order, in which we denied Plaintiffs' state and federal constitutional claims, effectively disposed of the Plaintiffs' Equal Protection Clause claim with finality; and that we therefore may only consider the Plaintiffs' claim that the Plan violates the Voting Rights Act. We disagree with both of these assertions.

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[6] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). Indeed, laws that entail overt racial classifications are subject to strict scrutiny, even when they burden or benefit different races equally. *See, e.g., Powers v. Ohio*, 499 U.S. ——, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). "[R]acial classifications do not become legitimate on the assumption that all persons suffer them in equal degree." *Powers*, 113 L. Ed. 2d at 425.

[7] George Orwell, Animal Farm 123 (Penguin Books 1972) (1946).

Although *Shaw* had not yet been decided at the time the Plaintiffs initiated the instant suit, the allegations in the Plaintiffs' complaint are clearly sufficient to make out a cognizable claim of racial gerrymandering under *Shaw*. The narrow holding of *Shaw* is that a citizen states a claim under the Equal Protection Clause by alleging that the reapportionment scheme adopted by his state is so irrational on its face, so bizarrely shaped and convoluted, "that it can only be understood as an effort to segregate voters into separate voting districts because of their race . . . ."[8] There is no question that the Plaintiffs make such allegations in their complaint.

For example, the Plaintiffs allege that "[t]he adoption of Act 42 . . . has resulted in the creation of at least two of seven districts which are devoid of any commonality of interest . . . geographical compactness, contiguousness [sic], consistency with existing political, societal, governmental or economic districts or jurisdictional boundaries, other than the racial designation of the majority therein." Similarly, the plaintiffs allege that "Act 42 created two amorphous districts which embody a scheme for segregation of voters by race in order to meet a racial quota for representation of the State of Louisiana in the United States House of Representatives." And again, Plaintiffs allege that "[t]he defendants enacted and intend to implement Act 42 with the intent to create a Congressional Plan concentrating voters of a particular race in designated districts . . . ." We find that these statements clearly amount to allegations that the State of Louisiana "adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race."[9] We conclude that the Plaintiffs have stated an Equal Protection Clause claim essentially identical to the claim alleged by the plaintiffs in *Shaw*.

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[8] *Shaw*, 125 L. Ed. 2d at 536 (indicating that irregular shapes may imply impermissible racial gerrymandering). *See also id.* at 528-29.

Moreover, our 1992 Order, denying Plaintiffs' state and federal constitution claims, worked a temporary dismissal of Plaintiffs' equal protection claim, not a final one. It was clearly an interlocutory ruling.

In an order dated June 29, 1993 (1993 Order) we requested supplemental briefing to clarify the relevance of *Shaw* to the instant case and to appear at the Evidentiary Hearing to elucidate whether the Plan was "narrowly tailored to further a compelling government interest," as required by the Court in *Shaw*. Of necessity our 1993 Order modified our 1992 Order and reactivated the Plaintiffs' equal protection claim in light of *Shaw*. As such a resuscitation is specifically contemplated and authorized by Rule 54(b) of the Federal Rules of Civil Procedure,[10] the Plaintiffs' equal protection claim persists and demands adjudication by this court.

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[9] *Shaw*, 125 L. Ed. 2d at 536.

[10] Rule 54(b) of the Federal Rules of Civil Procedure reads in pertinent part: "[A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims . . . and the order . . . is subject to revision at any time before the entry of judgment adjudicating all the claims . . ." Fed. R. Civ. P. 54(b).

III

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As the findings of fact and conclusions of law in this case are inextricably intertwined, we do not present them in separate sections. Such separate presentation would increase the length and redundancy of our discussion. Rather, our language will indicate whether we find a particular observation to be a finding of fact or a conclusion of law. To the extent that a finding of fact is also a conclusion of law, we adopt it as both a finding of fact and a conclusion of law. To the extent that a conclusion of law is also a finding of fact, we also embrace it as both a conclusion of law and a finding of fact.

A. *Racial Gerrymandering: General*

Plaintiffs allege that the Plan is a product of racial gerrymandering. Consequently, as noted above, this case falls squarely within the ambit of *Shaw v. Reno*. In *Shaw*, the Court held that plaintiffs state a justiciable claim under the Equal Protection Clause by alleging that a redistricting scheme is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race . . . ."[11] As *Shaw* was an appeal of the district court's dismissal of the plaintiff's case for failure to state a claim, however, the Court did not have to resolve that claim; it had only to recognize it. Thus, the roadmap sketched by the Court—as helpful as it is—leaves some questions to be answered in cases such as this.

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[11] *Shaw v. Reno*, 125 L. Ed. 2d. at 536.

1. *Racial Gerrymandering Defined*

A legislature creates a racially-gerrymandered districting plan when it *intentionally* draws one or more districts along racial lines or otherwise intentionally segregates citizens into voting districts based on their race.[12] Thus, "racial gerrymandering" refers to the *intentional,* not the accidental, segregation of voters on the basis of race.[13]

2. *Racially Gerrymandered Plans are Subject to Strict Scrutiny*

The bedrock principle underlying the Court's decision in *Shaw* is that racially gerrymandered redistricting plans are subject to the same strict scrutiny that applies to other state legislation classifying citizens on the basis of race.[14] As such, racially gerrymandered plans violate the Equal Protection Clause of the Fourteenth Amendment unless they are narrowly tailored to further a compelling governmental interest.[15]

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[12] *See, e.g., Wright v. Rockefeller,* 376 U.S. 52, 66-67, 84 S. Ct. 603, 11 L. Ed. 2d 512 (1964) (in which the Court examined whether the plaintiffs had sustained their burden of proving "that the New York legislature was either motivated by racial considerations or in fact drew districts on racial lines"). *See also Shaw,* 125 L. Ed. 2d. 511 (in which "racially gerrymandering" and "intentional segregation of voters into separate voting districts" are used interchangeably throughout).

[13] For example, if a legislature devises a redistricting plan that separates river districts from mountain districts, and more blacks happen to live along the rivers, and more whites happen to live in the mountains, then the plan is not a product of racial gerrymandering, even though it entails some coincidental segregation. In short, *de facto* or accidental segregation is not constitutionally suspect, but state-sponsored intentional segregation is, irrespective of the legislature's underlying motives.

Such plans receive "careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." [16] This intense scrutiny is justified by the grave danger that is posed to our constitutional order and national community when a state creates and administers laws based on the race of its citizens.[17]

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[14] *Shaw v. Reno*, 125 L. Ed. 2d 511; *accord City of Mobile v. Bolden*, 446 U.S. 55, 67, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980) (indicating that claims of racial discrimination in the reapportionment context are resolved in the same way as other claims of racial discrimination); *Washington v. Davis*, 426 U.S. 229, 240, 96 S. Ct. 2040, 48 L. Ed. 2d (1976) (referring to *Wright v. Rockefeller*, 376 U.S. at 58, and pointing out that every member of the Court believed that plaintiffs stated a claim by alleging that "boundaries were purposefully drawn on racial lines"). In its supplemental brief to this court, the United States (which entered this case as amicus curiae) agrees that racially gerrymandered redistricting plans must be strictly scrutinized.

[15] *See Shaw*, 125 L. Ed. 2d at 528.

[16] *Id.* at 527. Thus, even if benign or benevolent motives underlie a legislature's decision to racially gerrymander a redistricting plan, that plan is still subject to strict judicial scrutiny. As discussed below, good motives may allow a plan to survive strict scrutiny, if they rise to the level of a compelling state interest, and if the plan is narrowly tailored to further such an interest. But such motives—however unspotted—do not automatically exempt the plan from what amounts to a presumption of unconstitutionality.

[17] In *Wright v. Rockefeller*, Justice Douglas discusses the dangers of racial gerrymandering. *Wright v. Rockefeller*,

3. *Racial Gerrymandering May be Proved Either Inferentially or Directly*

We have already noted the narrow holding of *Shaw*: a plaintiff may state a claim under the Equal Protection Clause by alleging that the reapportionment scheme adopted by his state is so irrational on its face "that it can only be understood as an effort to segregate voters into separate voting districts because of their race . . . ."[18] *Shaw* primarily deals with the problem of proving racial gerrymandering *indirectly* or *inferentially*. Racial gerrymandering—says the Court in *Shaw*—can be inferred when districts are so bizarrely shaped that they presumptively bespeak an impermissible purpose.

But racial gerrymandering may—*a fortiori*—also be proved by *direct* evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on their race. If everyone—or nearly everyone—involved in the design and passage of a redistricting plan asserts or concedes that design of the plan was driven by race, then racial gerrymandering may be

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376 U.S. 52, 66-67 (Douglas, J., dissenting) ("When racial . . . lines are drawn by the State, the multiracial . . . communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race . . . rather than to political issues are generated; communities seek not the best representative but the best racial . . . partisan."). In *Shaw*, Justice O'Connor echoes these same concerns. *Shaw*, 125 L. Ed. 2d. at 529 (Redistricting plans that segregate citizens primarily on the basis of race bear "an uncomfortable resemblance to political apartheid.").

[18] *Shaw*, 125 L. Ed. 2d at 536; *see id*. at 528-29 (indicating that irregular shapes may reflect impermissible racial gerrymandering).

found without resorting to the inferential approach approved by the Court in *Shaw*.[19] The Court recognized in *Shaw* that "[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute."[20] The same is equally true when virtually unanimous, essentially uncontroverted *direct* trial evidence establishes racial classification, as it did here. In this case, we find overwhelming evidence—both *indirect* and *direct*—that the Plan is a product of racial gerrymandering.

4. *Intent Distinguished from Motive*

In a brief aside, we draw on the familiar crime of homicide as a didactic analogy to clarify the important distinction between *intent* and *motive* for purposes of this case. By definition, one who knowingly cocks, aims, and fires a loaded gun at another has the *intent* to kill or cause great bodily harm. That is the *purpose* for shooting. But the shooter may have any number of *motives* for intentionally shooting the victim: to eliminate a romantic rival; to collect insurance proceeds; to avenge some actual or perceived wrong; to repel aggression; to prevent the victim from perpetrating a crime or misdeed; and on and on. The applicable motive is the *goal* sought to be accomplished through the *intentional* killing of the victim.

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[19] *See id.* at 528-29, 536 (regardless of how a racial gerrymander is created, it should receive strict scrutiny); *accord City of Mobile v. Bolden*, 446 U.S. 55, 67, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980).

[20] 125 L. Ed. 2d at 525 (citing *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979)).

We belabor the distinction between intent and motive because it provides a more recognizable way of looking at two separate aspects of this case: 1) the *intent* of the Legislature in creating the Plan on the basis of race (racial gerrymandering); 2) the *motives* of the Legislature or of individual or groups of legislators—whether compelling or not—for engaging in racial gerrymandering. Whatever the *motivations* of the Legislature or of the individual legislators who passed the Plan, the evidence overwhelmingly indicates that the *specific intent* of the Legislature—as an independent, collective organism—was indisputably to enact a plan that included two black and five white majority districts.

At the Evidentiary Hearing so much of the testimony purporting to discuss the intent of the Legislature, or those who sought to influence Louisiana's 1992 redistricting, confounded and confused *intent* or purpose with *motive* or goal. More telling (and more candid) was the testimony at the Trial, a year earlier, concerning the *motive* for creating a second majority-black congressional district. That testimony differed markedly from its counterpart at the Evidentiary Hearing. In both proceedings the testimony on motive was considerably less uniform than was the virtually unanimous testimony regarding the Legislature's *intent* to create a second safe, black majority district. At least by implication, however, four immutable elements provided a common point of departure for all witnesses: 1) Louisiana had an unavoidable legal obligation to reapportion its congressional delegation; 2) reapportionment had to be in strict compliance with the constitutional imperative of one-person, one-vote, meaning that each of Louisiana's seven congressional districts had to contain roughly

603,000 residents; 3) given its failure to adopt a reapportionment plan in 1991, the Legislature would have to adopt a plan in its 1992 session that would be certain to receive immediate preclearance so that the congressional election, scheduled for the fall of that year, could be held; and 4) to obtain timely preclearance, i.e., voluntarily and not by court decree, any plan would have to include two safe, black majority districts.[21]

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[21] Even though the Legislature put itself under severe time constraints by failing to redistrict in 1991, the United States Department of Justice—not a party to this litigation—must be regarded as an active player in this case. As Louisiana is covered by Section 5 of the Voting Rights Act, the Legislature must either (1) have any proposed plan precleared by the Department of Justice, or (2) seek a judgment from the United States District Court for the District of Columbia declaring that the plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ." Voting Rights Act of 1965, 42 U.S.C. § 1973(c). The testimony at the Trial and at the Evidentiary Hearing reflected overwhelmingly that the Attorney General's Office (AGO) had let it be known that preclearance would not be forthcoming for any plan that did not include at least *two* "safe" black districts out of seven. But neither Section 2, nor Section 5 of the Voting Rights Act justifies the AGO's insistence upon two black districts.

To challenge a redistricting plan under Section 2 successfully, plaintiffs who are members of a cognizable racial group must demonstrate that their group is *numerous* enough and *geographically compact* enough to be a majority in a district. *Growe v. Emison,* 507 U.S. ——, 113 S. Ct. ——, 122 L. Ed. 2d 388, 403 (1993) (extending the threshold requirements elaborated in *Thornburg v. Gingles,* 478 U.S. 30, 46-47, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986), to single member, as well as multimember, districts). Obviously, however, black voters in District 4 do not constitute a *geographically compact* body as required by *Gingles.* Neither would any district resembling

B. *Shaw v. Reno: Inferential Proof of Racial Gerrymandering*

Shaw deals primarily with proving racial gerrymandering *inferentially.* We proceed to examine the

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District 4 be geographically compact. Consequently, the AGO cannot legitimately claim that Section 2 of the Voting Rights [Act] compels the creation of any redistricting plan that contains a tortured district like District 4. Unless a second geographically compact black majority district is possible, the State's failure to create one does not violate Section 2. *Growe,* 122 L. Ed. 2d at 404. This is not to say that Section 2 forbids the creation of such a plan; simply that Section 2 does not require it. *Voinovich v. Quilter,* 507 U.S. ——, 113 S. Ct. ——, 122 L. Ed. 2d 500, 513-14 (1993). Consequently, the AGO cannot rely on Section 2 of the Voting Rights Act to force a state to adopt a plan containing an additional majority-minority district with a geographically dispersed black majority.

Additionally, Section 2 of the Voting Rights Act expressly states that "[n]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Voting Rights Act of 1965, Section 2, 42 U.S.C. § 1973. Section 2 refuses to transform the individual right to vote into a group right to elect. Thus, Section 2 emphatically does not authorize the AGO to reject plans that fail to "give full effect" to minority voters, or otherwise to create a *de facto* requirement of proportional representation by rejecting all plans that fail to maximize the concentration of minority voters. The text of Section 2 of the Voting Rights Act expressly declares that proportional representation is not required.

Neither can Section 5 of the Voting Rights Act—on the basis of the 1990 Census—justify the AGO's insistence that Louisiana adopt a congressional redistricting plan with two safe, black-majority districts. In *Beer v. United States,* the Supreme Court stated that "the purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of indirect or circumstantial evidence of racial gerrymandering in the instant case.

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racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 47 L. Ed. 2d 629 (1976) (emphasis added); *accord Shaw*, 125 L. Ed. 2d at 533. In this case, however, a redistricting Plan for the State of Louisiana that provided for one black majority district would have satisfied the requirement of nonretrogression.

As a result of the 1990 Census, Louisiana lost a seat in the United States House of Representatives: previously it had eight seats, now it has seven. Thus, even if the Legislature had adopted a plan with a single black majority district, that plan would have satisfied the Section 5 nonretrogression principle: whereas before black majority districts comprised one-eight of all districts, under a new plan with one black majority district, such districts would constitute one-seventh of all districts, an increase of nearly two percent. Thus, the Section 5 nonretrogression principle does not, on the instant facts, require Louisiana to adopt a redistricting plan with a second black-majority district. Any suggestion by the AGO to the contrary was incorrect.

In summary, neither Section 2 nor Section 5 of the Voting Rights Act justify the AGO's insistence that Louisiana adopt a plan with two safe, black majority districts. Yet members of the Legislature uniformly believed that they needed to create such a redistricting plan to secure preclearance. The letters sent by the Office of the Assistant Attorney General (AAGO) in response to redistricting plans for the Louisiana Senate and the Board of Elementary and Secondary Education (BESE) show how Louisiana legislators got this mistaken impression.

In these letters, the AAGO acknowledged that the plans "appear[ed] to have no retrogressive effect" and met "in large part . . . Section 5 preclearance requirements." Yet the AAGO refused to preclear the plans because—in its apparent judgment—they could have been drawn "in a manner that would more effectively provide to black voters an equal opportunity . . . to elect candidates of their choice," there

1. *The Shifting Evidentiary Burden*

The Court in *Shaw* apparently intended to establish an evidentiary "minuet" for racial gerrymander-

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a euphemism for black candidates. But, again, the Voting Rights Act does not require that a plan be drawn to maximize the efficacy of the black vote, and we perceive the AAGO's insistence upon such a result to be tantamount to an insistence upon proportional representation: an insistence that is expressly forbidden by Section 2 of the Voting Rights Act.

In one letter the AAGO went so far as to suggest *how* the plan should be drawn to secure early preclearance by combining "significant concentrations of black voters in northeastern Louisiana and in the parishes bordering the State of Mississippi, both along the river and the state's southern border." Here—in a nutshell—was a blueprint for the highly irregular district known as District 4: a district that runs through the length and breadth of the State, a district that ignores traditional geographical and political boundaries, yet a district that the AAGO inappropriately hinted would have to be created if Louisiana was to secure preclearance. What was the authority for the AAGO's insistence? The answer presents itself: none.

When State authorities wrote back, explaining the historical, cultural, political, economic, and religious significance of the north-south divide in Louisiana, as a means of explaining and defending its proposed plan, the AAGO dismissed the explanation and concluded that lumping black voters together in a district "transcends the distinction between northern and southern parishes." What was the authority for this judgment: again, none! To reiterate, neither Section 2 nor Section 5 of the Voting Rights Act requires that geographically dispersed black voters be lumped together to maximize the efficacy of their vote. That is nothing more than an AAGO "gloss" on the Voting Rights Act—a gloss unapproved by Congress and unsanctioned by the courts.

The Department of Justice did not conclude that Louisiana's concern with preserving its historic parishes was pretextual; it *decided* that creating black districts trumped traditional redistricting criteria. What was the authority for this policy ing cases analogous to the one established by *McDonnell Douglas v. Green* and *Texas Department of Community Affairs v. Burdine* in the Title VII context.[22] After a citizen establishes a cause of action by

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decision? Yet again, none! As the AAGO concluded that the State BESE plan was not retrogressive with respect to the black vote, it necessarily admitted that the plan had no discriminatory effect. *See Beer v. United States*, 47 L. Ed. 2d 629, 639. Thus, the AAGO could legally reject the plan only if it determined—and presumably for non-arbitrary reasons—that the plan reflected discriminatory motives. *Georgia v. United States*, 411 U.S. 526, 93 S. Ct. 1702, 36 L. Ed. 2d 472 (1973). But the AAGO did not so conclude.

Rather, the AAGO arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies, rather than as a shield to prevent lamentable historical abuses. The Attorney General's Office has no authority to withhold preclearance for reasons outside the ambit of the Voting Rights Act. Indeed, because any plan that entails more racial gerrymandering than is absolutely necessary to pass Voting Rights Act muster is potentially unconstitutional, *Shaw*, 125 L. Ed. 2d at 534, the AGO will risk encouraging unconstitutional conduct if it pressures states to gerrymander their districts to maximize the concentration of minority voters.

[22] *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The three-step McDonnell-Douglas-Burdine "minuet" structures the basic allocation of burdens and order of presentation of proof in the Title VII context. *Burdine*, 450 U.S. at 252-53. This minuet requires (1) the plaintiff to prove—by a preponderance of the evidence—a prima facie case of disparate treatment that contravenes Title VII of the Civil Rights Act of 1964, (2) the defendant to proffer a legitimate, nondiscriminatory reason for the employee's rejection, and (3) the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. *Id.* at 253. At the

alleging that the reapportionment scheme adopted by his state is so irrational on its face that it can only be understood as an effort to segregate voters on the basis of race—thereby creating a presumption of unconstitutionality[23]—the burden shifts to the state to proffer a legitimate, non-racial explanation for the irrationally shaped districts in its plan.[24] If, per chance, the state should answer, generally denying gerrymandering, and move for summary judgment, the plaintiff presumably would need to support such a presumption with summary judgment evidence, e.g., affidavits and depositions demonstrating legislative intent, violation of redistricting principles, or the like. But if the state advances a legitimate, non-racial explanation for the plan's irregularity, then the factfinder must—as always—weigh the evidence on both sides and decide whether the plaintiff has met his burden of demonstrating that the plan's irrational shape reflects racial gerrymandering.[25]

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end of the day, however, the plaintiff has the burden of proving that a violation of Title VII occurred. *See St. Mary's Honor Center v. Hicks,* 509 U.S. ——, 113 S. Ct. ——, 125 L. Ed. 2d 407 (1993).

[23] *Shaw*, 125 L. Ed. 2d at 536; *See also id.* at 528-29 (indicating that irregular shapes may imply impermissible racial gerrymandering).

[24] *Id.*

[25] *See, e.g., Wright,* 376 U.S. 52 (in which the Court held that the plaintiffs had not "sustained their burden of proving that . . . [the plan] . . . segregates eligible voters by race and place of origin in violation of the Equal Protection and Due Process Clauses . . . ."); *accord Whitcomb v. Chavis,* 403 U.S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971). To clarify this minuet further, if a plaintiff comes into court with a map bearing hideously contorted districts and evidence that

Although the Court in *Shaw* does not discuss the respective burdens borne by the parties in this shifting protocol, Supreme Court precedent clearly indicates that plaintiffs have the ultimate burden of proving—by a preponderance of the evidence—that the irregularity of the challenged districts reflects racial gerrymandering.[26] Proof on the merits would likely focus on the pretext of the state's proffered nondiscriminatory reasons. Nevertheless, placing the burden of proof on the plaintiffs reflects a basic tenet of equal protection analysis: there can be no violation of the Equal Protection Clause unless those who complain demonstrate that the state has engaged in purposeful discrimination.[27] Thus, in this case, Plaintiffs have the burden of demonstrating by a predonderance of the evidence that the Legislature was "motivated by racial considerations" when it

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the state legislature drew those districts on the basis of race, and if the plaintiff complains that those districts lack a nonracial explanation—i.e., cannot be explained or understood without hypothesizing racial gerrymandering—then the plaintiff has stated a prima facie case under *Shaw*. If the state then introduces evidence that tends to show that the legislature was actuated by other motives that can explain the bizarre contours of the districts without resorting to race, the state has created a competing inference. The factfinder must then decide, on the basis of all available evidence, who is right.

[26] *Id.*

[27] *City of Mobile v. Bolden*, 446 U.S. at 66, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980) (citing *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)); Plaintiffs also have the burden of proving the invalidity of a reapportionment plan under Section 2 of the Voting Rights Act. *Voinovich v. Quilter*, 507 U.S. ——, 113 S. Ct. ——, 122 L. Ed. 2d 500, 512 (1993).

adopted Act 42.[28] We find that the plantiffs have met that burden—comfortably.

2. *Plaintiffs' Cause of Action*

In addition to stating a cause of action by alleging extreme irregularity of shape, a plaintiff may, under *Shaw*, strengthen the inference that the state engaged in constitutionally suspect racial gerrymandering by demonstrating the state's disregard of traditional districting principles.[29] As discussed above in section II B, the Plaintiffs have clearly alleged both that the Plan—particularly District 4—is highly irregular on its face, and that the Plan disregards traditional districting principles.[30] We therefore conclude that the Plaintiffs established a cause of action essentially identical to that alleged by the plaintiffs in *Shaw*. It consequently devolved upon the Defendants either to refute the allegations directly or to provide legitimate, non-racial explanations for the Plan's irrational shape and its disregard of traditional districting criteria.[31]

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[28] *Wright*, 376 U.S. at 55.

[29] *Shaw*, 125 L. Ed. 2d at 528.

[30] For example, Plaintiffs allege that "[t]he adoption of Act 42 . . . has resulted in the creation of at least two of seven districts which are devoid of any commonality of interest . . . geographical compactness, contiguousness [sic], consistency with existing political, societal, governmental or economic districts or jurisdictional boundaries, other than the racial designation of the majority therein." *See* discussion in section II B of this Memorandum Opinion for other examples of Plaintiffs' allegations.

[31] Recalling our pedagogic comparison with homicide, when the state attempts to convict a defendant of homicide using

3. *Defendants' Proffered Justifications*

Apparently recognizing the impossibility of directly refuting high irregularity and violation of traditional districting criteria, the Defendants attempted to justify the Plan. During the entire Trial, not one witness ever suggested that the Legislature's *intent* in creating District 4 was anything other than to create a second district with a super-majority of black voters by drawing its boundaries along racial lines. Indeed, most of the testimony of the Defendants' witnesses concerned how numerically large a black majority was needed to ensure the effectiveness of the Plan, which everyone conceded to be a product of racial gerrymandering.

At the Evidentiary Hearing, however, following as it did on the heels of the Supreme Court's decision in *Shaw*, the Defendants—with the benefit of hindsight—attempted to deny the racial gerrymandering that they so candidly proclaimed and avidly defended a year earlier at the Trial. Specifically, the Defendants now suggest that two non-racial factors played key roles in the creation of the Plan: partisan/incumbent politics and socioeconomic commonalities. As discussed in the following section, we find the Defendant's explanations wholly unconvincing and in many respects disingenuous.

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circumstantial evidence—essentially arguing that the facts are consistent with homicide, the defendant may attempt to show that the evidence is consistent with a far more innocent hypothesis: for example, an accident. The Defendants' opportunity to provide legitimate, non-racial explanations for the Plan's irrational shape is analogous.

4. *Choosing Between the Competing Inferences*

Because of the procedural posture of *Shaw*, the Court did not have to go beyond reversing the district court's grant of the defendants' motion to dismiss. Following a full merits trial here, however, we are obliged to decide whether the Plaintiffs have carried their burden of proving—by a preponderance of the evidence—that the Plan's irregularity and its disregard of traditional redistricting principles reflect racial gerrymandering. As we find that the *only sensible* explanation for the Plan's extreme facial irregularity and is flagrant deviation from traditional districting criteria is that the Legislature intentionally segregated voters into congressional districts based on their race, we conclude that the Plaintiffs have overwhelmingly satisfied their burden of proving racial gerrymandering.

a. *Plaintiffs' Inferential Evidence*

1. *The Plan is Highly Irregular*

The most cursory inspection of the districts established by Act 42 reveals several of them to be irregular, and District 4 to be highly irregular.[32] Like the fictional swordsman Zorro, when making his signature mark, District 4 slashes a giant but somewhat shaky "Z" across the state, as it cuts a swath through much of Louisiana.[33] It begins north of Shreveport—in the northwestern corner of Louisiana, just east of the Texas border and flush against the Arkansas border—and sweeps east along that border, periodically extending pseudopods southward to engulf small pockets of black voters, all the way to the Mississippi River. The district then turns south and meanders down the west bank of the Mississippi River in a narrow band, gobbling up more and more black voters as it goes. As it nears Baton Rouge, the district juts abruptly east to swallow predominantly black portions of several more parishes. Simultaneously, it hooks in a northwesterly arc, appropriating still more black voters on its way to Alexandria, where it selectively includes only predominantly black residential neighborhoods. Finally, at its southern extremity, the district extends yet another projection—this one westward towards Lafayette—adding still more concentrations of black residents. On the basis of District 4's physiognomy alone, the Plan is thus highly irregular, suggesting strongly that the Legislature engaged in racial gerrymandering.[34]

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[32] *See* Map, Appendix B.

[33] *Id.*

2. *The Plan Violates Traditional Redistricting Principles*

In *Shaw*, the Court reiterates the notion that states are not constitutionally *required* to adhere to the traditional redistricting principle of compactness, contiguity, respect for established political subdivisions, and commonality of interests.[35] The Court also observes that a state's *adherence* to traditional districting criteria "may serve to defeat a claim that a district has been gerrymandering on racial lines." [36] Yet a state's *disregard* of such criteria, emphasizes the *Shaw* opinion, may be evidence of constitutionally-suspect racial gerrymandering.[37]

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[34] *See generally Shaw*, 125 L. Ed. 2d 511.

[35] *Shaw*, 125 L. Ed. 2d at 528-29 (citing *Gaffney v. Cummings*, 412 U.S. 735, 752, n.18, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973)). The seminal case of *Major v. Treen* also discusses these traditional redistricting criteria and applies them to the Louisiana context. *Major v. Treen*, 524 F. Supp. 325 (E.D. La. 1983).

Indeed, the Court in *Shaw* refers to a situation "in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles . . ." as a circumstance in which racial gerrymandering can be easily inferred, precisely because the state ignored such principles.[38] As a state's decision to disregard traditional redistricting criteria is probative of constitutionally-suspect racial gerrymandering, we closely examine the Plan's adherence (or, more accurately, non-adherence) to those principles; and we find that, for the most part, the Plan cavalierly disregards them.

a. *Compactness*

District 4 snakes narrowly across Louisiana soil from end to end for more than 600 miles.[39] A rectangle superimposed on the Z-shaped figure formed by District 4 would overlay two-thirds of the State. Additionally, at it winds along its erratic path, District 4 projects myriad diverticulae to encapsulate small sacs of otherwise widely dispersed black voters.

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[36] *Id.* at 529 (citing *Kardner v. Daggett,* 462 U.S. 725, 755, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983).

[37] *Id.* at 528.

[38] *Id.*

[39] *See* Map, Appendix B.

No one could claim that District 4 is compact, at least not with a straight face.

b. *Contiguity*

District 4 was confected to satisfy the traditional districting criterion of contiguity, but only hypertechnically and thus cynically. When displayed on a map of the State, the district's boundaries seem several times to narrow to a single point. This impression reflects reality, for at some places along its attenuated path, District 4 is no more than 80 feet wide. Such tokenism mocks the traditional criterion of contiguity.[40]

c. *Respect For Political Subdivisions*

As one witness explained at the Evidentiary Hearing, there is no more fundamental unit of societal organization in the history of Louisiana than the parish.[41] Whereas the previous congressional plan divided only seven of modern Louisian's 64 parishes, scattering fractions of the same parish in more than one congressional ditsrict, Act 42 splits and scatters 28. District 4 is particularly aggressive in violating the boundaries of these traditional political and governmental units of the State: of the 28 parishes touched by District 4, only four whole parishes are included; but the district annexes only shards of 24 additional parishes, usually incorporating none but the predominantly black fragments of those shattered regions. Additionally, for the first time in Louisiana history, with the advent of Act 42 a districting plan violates the boundaries of nearly all major municipalities in the State. With the exception of Lake Charles, the Plan fragments all major municipalities into more than one congressional district, thereby destroying the common representation historically enjoyed by residents of the same municipality.[42]

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[40] In complementary fashion, District 6 maintains contiguity only by employing gossamer connections at several junctions.

[41] A parish is analogous to a county, but it has its roots in, and takes its name from, the ministrations of the Catholic Church in early Louisiana history.

d. *Commonality of Interests*

Within its irregular boundaries, District 4 subsumes bits of every religious, ethnic, economic, social, and topographical type found in Louisiana.

(i) *Religion and Ethnicity*

District 4 violates the traditional north-south ethnoreligious division of the State. Along its circuitous route, this new district combines English-Scotch-Irish, mainline Protestants, traditional rural black Protestants, South Louisiana black Catholics, Continental French-Spanish-German Roman Catholics, sui generic Creoles, and thoroughly mixed polyglots, each from an historically discrete and distinctive region of Louisiana, as never heretofore so extensively agglomerated.

(ii) *Economic Base*

Cotton and soybean plantations, centers of petrochemical production, urban manufacturing complexes, timberlands, saw mills and paper mills, river barge

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[42] Disregarding New Orleans, which comprises the majority of District 2, the major municipalities of Shreveport, Baton Rouge, Lafayette, Monroe, Alexandria, and Ruston are all rent asunder in this manner.

depots, and rice and sugarcane fields are strung together to form the eclectic and incoherent industrial base of District 4. These diverse segments of the State economy have little in common. Indeed, their interests more often conflict than harmonize.

(iii) *Geography and Topography*

Red clay hills and pinelands, hardwood bottomlands and forests, alluvial floodlands, coastal plains, marshes, swamps and wetlands—all are present in District 4, which—as noted above—stretches more than half a thousand miles from end to end. What did the Legislature intend when it created District 4 —this non-traditional, little-in-common "un-district"? The indirect evidence overwhelmingly indicates that the Legislature specifically intended to create a plan with at least two majority black districts. Given the pre-existence of District 2, we find beyond cavil that the Legislature accomplished this by parceling voters into the remaining six districts on the basis of race.

b. *Defendants' Counter-Proof*

In contrast, we have been shown no credible evidence supporting the defense witnesses' proffered motivations of party and incumbency protection and socioeconomic commonality. Their explanations ring hollow. We find them to be no more than disingenuous, *post hoc* rationalizations.

In particular, we find that neither partisan nor incumbency politics was a significant factor in the core decision intentionally to create a plan containing a second black majority district. At the trial, the Defendants never suggested that partisan or incumbent politics played a role in the determination to create

District 4.[43] Indeed, Defendants' counsel objected to Plaintiffs' counsel's questions aimed at eliciting testimony about the Black Caucus-Republican Caucus alliance that supported Act 42, arguing that such testimony was political and therefore irrelevant to the case. Moreover, even though party and incumbency protection play some role—large or small—in virtually everything done in the legislative branches (and executive branches, for that matter) of our contemporary governments, this universal truism does not negate the compelling inference that Act 42 in general, and District 4 in particular, are products of racial gerrymandering. Additionally, without for a moment granting that incumbency politics played a significant role in the decision to create a second majority black district, we question whether the Defendants could prevail in this litigation even if it had.

The Defendants seem to believe that they can defeat a claim of racial gerrymandering under *Shaw* if *any* factor other than race played *any* cognizable role in the creation of a challenged redistricting plan. Although we need not correct such a misconstruction of *Shaw* to find racial gerrymandering in this case, we briefly address this legal issue—*obiter dictum*—in hopes of shedding a little additional light on this difficult area of the law.

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[43] At the Evidentiary Hearing, Defendants introduced evidence of the role of incumbency, but it proved irrelevant to the issue of intentional segregation of voters by race. Such evidence showed, at most, that incumbency affected only the general location of the gerrymander that is District 4, i.e., the effective efforts of Congressional incumbents in "pushing" the pre-ordained second black majority district generally as far north and east as possible. Thus it follows largely the northern boundary of Louisiana with Arkansas and the eastern boundary of Louisiana, i.e., the Mississippi River. But, as Louisiana had already lost one of its eight seats in the House of Representatives, creating a game of incumbents' "musical chairs," none should be surprised by the interesting but irrelevant fact that, once the decision to create a second minority-majority district had been made, each incumbent did what he could to keep his traditional geographical base and see that the new district was located anywhere but in his.

The Defendants evidently base their belief—that the presence of any non-racial motivating factor will excuse racial gerrymandering—on language found at the end of the *Shaw* opinion. There the Court indicates that a plaintiff *states a claim* under the Equal Protection Clause by alleging that a reapportionment plan is so irrational on its face "that it can be understood *only* as an effort to segregate voters . . . ."[44] This emphatically does not mean that if any other factor influenced the legislature the plaintiff is unable to establish a racial gerrymander. Rather, it means that if the contours and content of a redistricting plan *can* be wholly explained to be the product of one or more factors other than race, then the defendants have created a competing inference. The court must then weigh the competing inferences—as indeed it usually must—to decide whether the plaintiff has proved his inference by a preponderance of the evidence.[45] Thus, accurately stated, the question posed by *Shaw* is whether a redistricting plan can be reasonably conceived as the product of non-racial factors. In this case the Plan cannot.[46]

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[44] *Shaw*, 125 L. Ed. 2d at 536 (emphasis added).

[45] *Wright v. Rockefeller*, 376 U.S. 52, 57, 84 S. Ct. 603, 11 L. Ed. 2d (1964).

[46] At the risk of flaying a dead horse, we point out that logic demands that the Defendants' reading of *Shaw* be re-

No one claims that the contours of District 4 can be wholly and alternatively explained as a product of partisan or incumbency politics. Every single witness who addressed the issue either proclaimed or acknowledged that the creation of a second black majority district was the primary factor—or at least a substantial and important factor—in the creation of the Plan. We agree. There is no way that a rational factfinder—looking at the map and reviewing the *credible* evidence with care—could conclude that Act 42 can be explained entirely without reference to racial gerrymandering.

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jected. Suppose a state legislature came right out and admitted that it racially gerrymandered districts in a reapportionment plan, thereby obviating the plaintiff's need to show racial gerrymandering inferentially. Could the state then say, "but we also drew a few district lines to protect incumbents, or to follow a river, or to put a state wildlife park in the district of a congressman who likes migratory birds," and thereby defeat plaintiff's claim beacuse race *was not the only factor* involved in the delineation of districts? Race will never be literally the only factor. So *Shaw* requires only that race be an important factor. If the plaintiff's evidence shows that the plan cannot be understood without postulating that the legislature was significantly actuated by racial motives, then the plaintiff has made out a case of racial gerrymandering.

The cases of *Wright v. Rockefeller* and *Arlington Heights v. Metropolitan Hous. Dev. Corp.* support this interpretation. In *Wright* every member of the court accepted that the plaintiffs stated a claim by alleging that the "New York Legislature was *either motivated by racial considerations*, or in fact drew the districts on racial lines." 376 U.S. at 54. Similarly, the Court in *Arlington Heights* noted that invidious discriminatory intent need not be the legislature's dominant purpose: proof that such discriminatory intent was "a motivating factor" in the legislation is sufficient. 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

At the Evidentiary Hearing, Dr. Alan Lichtman, an expert witness for the Defendants, opined that District 4—which appears so violative of traditional redistricting principles—actually possesses socioeconomic commonality and coherence. Dr. Lichtman contended that District 4 was distinguishable from other districts because its residents were relatively poor, relatively under-educated, and owned fewer telephones and automobiles than did the residents of other districts established by the Plan. The Defendants offered this evidence to suggest "a rational basis [for District 4] other than race."[47] We do not gainsay the conclusions of this witness, but we disagree that they have significance.

Any able statistician who looks at enough statistical characteristics (multivariate analysis) can find something distinctive about any district. In this case District 4 was found to be fairly poor, although poverty is not particularly distinctive in any region of Louisiana. Had District 4 been a fairly wealthy district, the Defendants' expert could have opined that the citizens of District 4 shared the common interest of wealth. And had District 4 fallen right in the middle, he could have explained that District 4 was distinctive in being the most solidly middle class. But all these observations are irrelevant because we find them to rise to no level higher than *post hoc* rationalization.[48]

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[47] The Defendants also offered this evidence to argue (1) that Act 42 served a compelling state interest by enhancing the representation for poor people—especially poor black people—and (2) that the Plan adhered to the traditional redistricting principle of "commonality of interests" and thus was narrowly tailored.

The Defendants admit that the socioeconomic profiles of the Plan's districts were not *actually* used by the Legislature: the census data used in Defendants' statistical analyses were not even available to the Legislature when it passed Act 42. More specifically, freshman Louisiana State Senator Tom Greene testified that no socioeconomic data was submitted with the various redistricting plans when they were considered by the Legislature. Thus, the allegedly distinctive socioeconomic profile of District 4 is factually unconvincing, methodologically flawed, irrelevant, and unquestionably a hindsight rationalization of a plan that everyone understands to have been principally designed to create two majority-black districts. More simply, the socioeconomic profile of District 4 is an *effect* of District 4's design, not a *cause.*

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[48] An additional criticism of Mr. Lichtman's statistical legerdemain is that the socioeconomic characteristics he analyzes are themselves strongly correlated with race, a classic chicken-or-egg fallacy. At this moment in history black people in the South (and generally in America) are—on the average—poorer and less well-educated than their white counterparts. Moreover, blacks in largely segregated communities are probably poorer—on the average—than blacks in more integrated communities. Consequently, racially gerrymandered plans, which seek to draw boundaries around various concentrations of black persons, will inevitably tend to concentrate the poorer, less well-educated blacks.

The Defendants' conclusions therefore have a tautological quality: to prove that factors other than race can explain District 4, the Defendants analyze socioeconomic factors that correlate strongly with race. Of course District 4 is relatively poor and relatively uneducated: it was intentionally filled with relatively poor and uneducated minorities. To use statistical parlance, Dr. Lichtman's conclusions are *spurious*: they tell us nothing that we could not have predicted based on the Legislature's decision to pack District 4 with black voters. For a more scientific discussion of such *spurious correlations*, see Hubert M. Blalock, Jr., *Social Statistics* 443-48 (McGraw-Hill 1972).

We see, then, that the Defendants' proffer of protection of incumbent politicians and distinctive socioeconomic profiles as alternative explanations for the peculiar contours of the Plan simply do not ring true. Faced with competing inferences, this court—as fact finder—must determine the credibility of witnesses, weigh the evidence, and choose between those inferences.[49] Concluding that the facts and inferences overwhelmingly favor the Plaintiffs, we find that the Plan is undeniably a child of racial gerrymandering.[50] Defendants must therefore demonstrate that Act 42 is narrowly tailored to satisfy a compelling state interest, as required by *Shaw* and other applicable Equal Protection Clause cases.[51]

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[49] *Wright v. Rockefeller,* 376 U.S. 52, 57, 84 S. Ct. 603, 11 L. Ed. 2d (1964).

[50] In finding that racial gerrymandering exists in this case, we feel confident that we are faithfully following the Supreme Court's temper in *Shaw.* In that case, the Court gives two examples of fact patterns in which proving racial gerrymandering "will not be difficult at all." *Shaw,* 125 L. Ed. 2d at 528. One example is when "a State concentrate[s] a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for subdivisions." *Id.* Those facts squarely conform to this case. In the instant case, the Louisiana State Legislature created a serpentine belt 600 miles long to engulf enough blacks (actually, more than enough) to create a single super-majority district. According to the Court, this case presents a textbook example of racial gerrymandering that can be easily proved by application of the *Shaw* inferential minuet.

C. *Direct Proof of Racial Gerrymandering*

We need not even consider the kind of indirect or inferential proof approbated in *Shaw* to reach the same point—a finding of racial gerrymandering. In this case, we also reach that junction when we consider the great weight of the *direct* evidence elicited at both the Trial and the Evidentiary Hearing.[52] Regardless of whether we reach a finding of racial gerrymandering by the inferential approach elaborated in *Shaw*, or by direct testimony and documentary evidence, the Defendants have the burden of justifying that gerrymandering.

In this case, direct evidence clearly and forcefully demonstrates that the Plan is a product of racial gerrymandering. Virtually every witness who testified at the Trial (all without the benefit of a retrospective, self-serving view of *Shaw*) either affirmatively stated or accepted as gospel that the Plan was drawn with the *specific intent* of ensuring the creation of a second, safe, black majority congressional district: namely, District 4. The Defendants' witnesses either stated or conceded that the districts created by Act 42 were racially gerrymandered. Indeed, those witnesses, both lay and expert, spent most of their time at the Trial discussing how large the percentage of registered black voters needed to be in the new majority black district to guarantee the efficacy of their racial gerrymander—an efficacy they viewed as the *sine qua non* of preclearance.

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[51] *Shaw*, 125 L. Ed. 2d at 528; *see also supra* note 13.

[52] *See Shaw*, 125 L. Ed. 2d at 528 (implying that however a racial gerrymander is established, it should receive strict scrutiny). *See also supra* note 17 and accompanying text.

In response to this court's query whether the Legislature had created a racial gerrymander, Defendants' counsel—Mr. Mongrue—said, "[a]nd [racial gerrymandering]'s exactly what [the Legislature] can do . . . ." Similarly, Mr. Willie Hunter, a black state legislator and a fact witness for the Defendants, testified that the Legislature's *intention* "was to create a district where there was an excellent possibility of having another black elected . . . , and that to accomplish this they [the legislators] "looked at numbers [of black voters] period." Professor Engstrom, an expert witness for the defense, stated unabashedly that "race drove . . . [the creation of] . . . the Districts."

Not surprisingly, the Plaintiffs' witnesses were at least equally convinced that considerations of race motivated the creation of Act 42. State Representative Adley, a white legislator from Northwest Louisiana, testified that "the only issue presented to us was a racial issue" and stated that District 4 was created "for the sole purpose of making sure that an additional black district got created regardless of what it looked like and what parishes it ran through . . ." Dr. Gary Stokley agreed that "this plan is [based on] race."

At the more recent Evidentiary Hearing, however, the Defendants attempted to recast their arguments in light of *Shaw* and to gainsay the racial gerrymandering that they so readily approbated during the pre-*Shaw* Trial. But even at this latter hearing the witnesses agreed that race was the overarching factor that drove the actual creation of the Plan, and that the Legislature had specifically intended to assort voters into districts based on race. Senator Marc Morial, a black legislator from New Orleans who appeared on behalf of the Defendants, testified that "[i]t was the intent of the Legislature to create . . . [a] . . . second majority black district." This is perhaps the clearest, most direct post-*Shaw* statement of intent, and the best illustration of the difference between *intent* and *motive*. Similarly, United States Congressman James A. Hayes (D. La) stated that the politics of race "was the major element" that drove the creation of the Fourth District. Dr. Lawrence N. Powell, one of Defendants' expert witnesses, agreed that "the primary determinant" of the shapes of Districts 2 and 4 was race.

During four full days of testimony, two in 1992 and two more in 1993, some witnesses stated that race was the only factor, while others said that race was the primary factor. One witness—apparently uncomfortable with saying race was the primary factor—admitted that race was a very important factor. Not one witness, Plaintiffs' or Defendants', testified that Act 42 was not largely a product of racial gerrymandering—not one.

Harking back to our homicide analogy, we note that although witnesses at the Evidentiary Hearing voiced various altruistic *motives*—or accused others of various ulterior *motives*—for intentionally employing racial gerrymandering to create voting districts on the basis of race,[53] everyone agreed that the *intent* of the Legislature—analyzed as a whole rather than from the point of view of its constituent members or caucuses—was to create a redistricting plan with a second majority black district.

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[53] Among the positive goals thus voiced were promoting racial harmony, increasing racial fairness, eradicating vestiges of past de jure segregation, and "obeying the law" in the sense of complying with the Voting Rights Act in a way that would justify preclearance, to name a few.

The evidence showed that the Plan passed the Legislature by virtue of an uncommon alliance of legislators: Some who supported the Plan wanted a second super-majority black district to increase the number of black representatives in Louisiana's congressional delegation. Other supporters of the Plan perceived various benefits in the correlative whitening of some districts that attends the intentional segregation of black voters into other adjacent districs.[54] But there is absolutely no doubt that the immediate *intent* of the Legislature as a whole was to enact a plan containing two black majority districts, essentially without regard to any other considerations and interests.

Viewed in any light, the direct evidence in this case proves the presence of racial gerrymandering. Thus, even in the event that we may have somehow misconstrued the Court's opinion in *Shaw*, or misapplied the inferential minuet established therein, the *direct evidence* that Act 42 was a product of racial gerrymandering is overwhelming. Two independent evidentiary bases (inferential and direct) thus support our finding that Act 42 reflects racial gerrymandering. Each is sufficient on its own to subject Act 42 to strict scrutiny, and each is consequently sufficient to require the Defendants to demonstrate that Act 42 is "narrowly tailored to further a compelling governmental interest," as required by *Shaw* and other applicable Equal Protection Clause precedents.[55]

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[54] Testimony at the trial revealed that Act 42 was passed by a legislative alliance between the Black and the Republican Caucuses, historically uncommon bedfellows but, according to expert testimony, a phenomenon occurring with increasing frequency across the country.

D. *Strict Scrutiny of the Plan*

Again, the core principle underlying the Supreme Court's decision in *Shaw* is that racially gerrymandered redistricting plans are subject to the same strict scrutiny that applies to other state legislation classifying citizens on the basis of race.[56] To survive such scrutiny, racially gerrymandered redistricting plans must be narrowly tailored to further a compelling governmental interest.[57]

1. *Compelling Governmental Interest*

Defendants advance four possible compelling state interests to justify their racial gerrymandering: (1) conformity with Section 2 of the Voting Rights Act, (2) conformity with Section 5 of the Voting Rights Act, (3) proportional representation of Louisiana blacks in Congress,[58] and (4) remedying the effects of past racial discrimination. Witnesses also made oblique references to various other admirable but nebulous—and often question-begging—motives, like promoting racial harmony and ensuring fairness. As we conclude, however, that Act 42 is not narrowly tailored to further these or any other compelling state interests, we need not decide here whether any one or more of them—properly clarified—is such an interest. For the sake of judicial economy, then, we do not analyze them in detail. Rather, we assume —without granting—that one or all of them constitutes a compelling state interest.

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[55] *Shaw,* 125 L. Ed. 2d at 528.

[56] *See supra* note 13.

[57] *Shaw,* 125 L. Ed. 2d at 528.

[58] At the Trial, Legislator Willie Hunter strongly advocated a second black majority district for the expressed goal of achieving black proportionality in congress. Without commenting—one way or another—on proportional representation's viability as a "compelling governmental interest," we foresee serious constitutional problems in accomplishing that goal through creation of a second black majority district. Evidence adduced here demonstrates that, of Louisiana black

2. *Narrowly Tailored*

By thus assuming—again, without granting—that the Defendants have articulated one or more compelling state interests that the Plan might further, we have shifted the focus of our strict scrutiny to the final aspect of *Shaw*: whether the Plan is narrowly tailored. In our final illustrative comparison with homicide, we note the parallelism between the hypothetical criminal defendant's burden—*at common law* —of establishing an affirmative defense—such as justifiable homicide—and the State's burden here of establishing the affirmative justification of a compel-

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voting age population outside New Orleans, even the overloaded 63% black District 4 would produce the election of the [black] candidate of choice of fewer than 40% of those blacks whom the proponents of proportional representation want to be thus represented in Congress. Consequently, the Plan would constitute state action that, in effect, grants voting "proxies" *from* the black voters residing in Districts 1, 3, 5, 6 and 7 *to* the black voters of District 4—clearly a disenfranchisement implicating equal protection and possibly due process as well.

ling state interest.[59] But even such affirmative defenses contain crucial limiting elements: the requirement of applying only reasonable force in the self-defense context, and the requirement of narrow tailoring in the compelling state interest context.

A homicide defendent, relying for acquittal on self-defense or justifiable homicide, must show not only that he had a reasonable fear of imminent harm from the aggressor/victim, but also that he used no more force than was reasonably necessary under the circumstances. If a single, deterrent gunshot to the aggressor/victim's leg happens to cause death from uncontrollable hemorrhaging, the homicide may well be justified; but if the defendant fires two or three or four additional, immediately-fatal shots into vital areas of that same aggressor/victim's body after he has been neutralized by the first shot in the leg, the defendant is likely to find that the affirmative defense is unavailing.

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[59] We realize that many states choose to make the absence of justification an element of the *actus reus,* thereby imposing upon the prosecution the burden of proving that the criminal defendant did *not* act in self-defense. As the Supreme Court has lately declined to review whether the Due Process Clause requires the burden of persuasion in self-defense cases to be placed on the prosecution, *see, e.g., Moran v. Ohio,* 469 U.S. 948, 105 S. Ct. 350, 83 L. Ed. 2d 285 (1984) (Brennan, J., dissenting), state legislatures remain free to allocate burdens of proof "by labeling as affirmative defenses" aspects of a case that could alternatively be considered elements of a crime. *Patterson v. New York,* 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); *see also McElroy v. Holloway,* 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398, 399-400 (Rehnquist, J., dissenting). For our purposes, however, such subtleties are irrevelant: as noted above, we are merely using classic common law homicide/self-defense as an instructive analogy.

In close parallel, *Shaw* tells us that, even in retrogression cases under Section 5, the State does not have carte blanche to engage in racial gerrymandering; its reapportionment plan must *not* go "beyond what [is] reasonably necessary" to further the compelling governmental interest.[60] That is the essence of narrow tailoring in the redistricting context: just as a homicide defendant may not use excessive force to stop an aggressor, neither may a state burden the rights and interests of its citizens more than is reasonably necessary to further the compelling governmental interest advanced by the state.

In this case, uncontroverted evidence from both the Trial and the Evidentiary Hearing convinces us that the Plan is not narrowly tailored to satisfy any of the supposedly compelling state interests advanced by the Defendants.[61] We reach that conclusion first because the Plan entails considerably more segregation than is necessary to satisfy the need for a second black majority district—even assuming arguendo that such a second district were itself justified—and second because the Plan excessively burdens a variety of third party interests—dramatically so.

In its *Shaw* opinion, the Supreme Court provides one example to illustrate how to apply the requirement that a racially gerrymandered plan be *narrowly tailored* to satisfy one or more compelling state interests: "A reapportionment plan would not be narrowly tailored to avoiding the goal of retrogression if the state went beyond what was reasonably necessary to avoid retrogression."[62] Thus, if providing a single majority-minority district satisfies the nonretrogression requirement imposed by Section 5 of the Voting Rights Act,[63] then a racially gerrymandered redistricting plan comprising more than one minority-majority district is not narrowly tailored to satisfy the compelling state interest of comporting with Section 5.[64] Stated more broadly, as voters have an equal protection right not to be segregated by their state legislatures or local governments into various voting districts on the basis of race, only a plan that segregates to no greater extent than is reasonably necessary to further a compelling governmental interest can survive constitutional scrutiny. The same can be said for a plan that supersaturates a majority-minority district, while concomitantly depleting adjacent majority-majority districts of minority voters.

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[60] *Shaw*, 125 L. Ed. 2d at 534.

[61] As noted above, in this section we assume—arguendo—that the State has demonstrated a compelling state interest, although, in fact, we have not so found. Neither could we on the evidence here presented. That is a judgment for the Legislature to make and the courts to review.

In this case, we find that the Plan entails more constitutionally suspect segregation than necessary, and is therefore not narrowly tailored. Continuing to assume arguendo that some state interest had been identified which could justify the creation of a second black-majority district, this Plan would have to be rejected as insufficiently narrowly tailored. It packs more black voters into a District 4 than are reasonably necessary to give blacks a realistic chance to determine the outcome of elections there, providing that they exercise their right to vote. Also, the boundaries of the district violate traditional districting principles to a substantially greater extent than is reasonably necessary.

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[62] *Shaw,* 125 L. Ed. 2d at 534.

[63] *Beer v. United States,* 425 U.S. 130, 141 (interpreting Section 5 as prohibiting voting-procedure changes that "lead to a retrogression in the position of racial minorities . . . .").

[64] The Court's example clearly indicates that the State of Louisiana may not justify the Plan, or any other racially gerrymandered plan with more than one black majority district, by reference to the need to comply with the Section 5 nonretrogression principle. As noted above, because Louisiana lost a seat in the United States House of Representatives, a plan with one black majority district would satisfy the Section 5 nonretrogression requirement given no more dramatic shift in the statewide ratio of white-to-black voters than is demonstrated by a comparison of the 1980 and 1990 census figures. *See supra* note 21.

District 4 contains 63% registered black voters, significantly more than are needed to elect representatives of their choice. To greater or lesser degrees, all expert witnesses acknowledged—some only reluctantly under cross examination—that 63% black voting age population was well in excess of the percentage needed for reasonable comfort in creating a safe voting-age majority-minority district. For further confirmation that this is so we need only ask rhetorically "If 54% is sufficient in District 2, why must District 4 be supersaturated with 63% black voting age citizens?" No evidence was adduced by the Defendants to demonstrate a substantial difference between the voting patterns in the areas covered respectively by Districts 2 and 4—either in white crossover or black block voting—to rationalize the 54%-63% disparity in black voting age populations.

Although the witnesses at trial disagreed on the exact percentage of net white cross-over votes for black candidates, we find that the evidence supported an average, *net* white cross-over vote in non-judicial elections of between 10% and 25%.[65] The evidence at trial also indicated that minority voter registration is now comparable to white registration. Clearly, District 4 need not contain a black voting age population of 63% to satisfy the interest of a second district in which black officials can be readily elected. And, although it is not the province of this court in this case to establish the demographic specifications of the State's congressional redistricting plan, we find on the basis of the credible testimony and documentary evidence, that in this instance a district with a black voting age population of not more than 55%—and probably less—would have been adequate to ensure that blacks could elect a candidate of their choice, assuming they chose to exercise their franchise and assuming the candidate of their choice had more than a modicum of appeal for non-black voters.

Additional confirmation that the Plan is not narrowly tailored lies in its excessive disregard of traditional redistricting criteria and its derogation from third-party interests. Supreme Court precedent indicates that a variety of factors, both relative and absolute, are germane to analyzing whether a government measure is narrowly tailored. These factors include (1) the necessity of the measure, (2) the efficacy of alternative race-neutral measures, (3) the availability of more narrowly tailored (less intrusive) measures, (4) the flexibility and duration of the measure, and (5) *the impact of the measure on the rights of third parties.*[66] Relevant Supreme Court jurisprudence thus suggests that—in essence—a plan is not narrowly tailored if it adversely affects more interests, if it generally wreaks more havoc, than it reasonably must to accomplish the articulated compelling state interest. We find that the Plan thus offends.

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[65] In other words, on the average—for non-judicial elections in Louisiana—black candidates will gain more votes from white cross-over voters (whites voting for black candidates) than they will lose from black cross-over voters (blacks voting for white candidates): thus, there is a positive *net* white cross-over vote. To put it another way, black voters are—again on the average—more racially coherent/conscious than white voters.

Whether under a relative or a comparative analysis, the evidence adduced at Trial and at the Evidentiary Hearing undeniably established that, even in the face of the black population's wide dispersion in Louisiana (outside New Orleans), a second black majority district could have been drawn that would have done substantially less violence to traditional redistricting principles. For example, Marc Morial stated that "[t]here were alternatives which would have created a more compact black district that were not enacted . . . ." Similarly, Congressman Hayes admitted that a more compact plan could have been enacted. Freshman United States Congressman Cleo Fields—the former state senator and incumbent congressman from new District 4, who testified for the Defendants—also acknowledged that "it would have been possible to fulfill the desire of a second [black] majority district . . . and pay more attention than this District [District 4] does to both compactness and contiguity."

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[66] See, e.g., *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 510-511, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989); *United States v. Paradise*, 480 U.S. 149, 171, 107 S. Ct. 1053, 94 L. Ed. 2d 203 (1987); *Fullilove v. Klutznick*, 448 U.S. 448, 510-15, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980).

Dr. Alan Litchman—one of the Defendants' expert witnesses at the Evidentiary Hearing—likewise testified that, were he to sit down with Dr. Ronald Weber (the expert on the other side) they "could create a [second black majority] district that looked better than this one [district 4]." And Dr. Weber—the Plaintiffs' expert witness at both the trial and the evidentiary hearing—testified that a plan could be devised that would include a second black majority district, yet still be significantly more compact and comport much more closely with other traditional redistricting principles.

The testimony of freshman state Senator Tom Greene at the Evidentiary Hearing was perhaps the most enlightening on this point. He stated that, with the neutral assistance of the Legislature's redistricting computer technician, he (Greene) actually created a plan that evinced greater respect for Louisiana's traditional parish boundaries than the Plan, and still included a second majority-black district. Finally, Mr. Glenn Koepp, who is the Assistant Secretary of the Senate and the technician in charge of reapportionment activity in Louisiana since 1981, testified that computer-supported mathematical modeling programs gave the State the tools to create several plans —including several with a second black district— that would respect traditional redistricting criteria to a much greater degree than does the Plan. Thus, the great weight of the credible evidence indicates that the Legislature could have developed and adopted a redistricting plan—even one with a second majority black district—that reflected greater respect for traditional redistricting criteria and that was less disruptive to the traditional political, social, economic, ethnic, geographical, and religious organization of the State. In short, substantially less extreme racially gerrymandered plans are readily available; plans without such obviously overbroad, overarching overkill.

In summary, we hold that the Plan is *not* narrowly tailored, either relatively or absolutely. This is so because it embraces considerably more racial gerrymandering—and thus more segregation—than is needed to satisfy any advanced state interest, and because the Plan unnecessarily violates a host of historically important redistricting principles, thereby adversely affecting countless third party interests. These several and varied interests—some constitutionally protected and others merely important—may not be callously sacrificed on the altar of political expediency, particularly when less broadly tailored plans are conceivable.[67]

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[67] We offer no opinion as to how much more narrowly tailored a plan would have to be to survive strict scrutiny. Indeed, we cannot say whether it is even possible—based on the 1990 Census—to devise a plan that would have two majority-minority districts and still be narrowly tailored *vel non*.

Even a plan that under the circumstances is as narrowly tailored as possible—in a *relative sense* (i.e., the least invasive and damaging plan available to further a compelling state interest)—may fail to be sufficiently narrowly tailored—on an *absolute* basis—to pass constitutional muster. For example, when the minority population is spread so evenly throughout a state that a majority-minority district cannot be drawn without dramatically impairing the constitutional rights of the citizens of that state, there may simply be no constitutionally permissible way to draw such a district, no matter how defensible the legislature's motives for wishing to do so, or how *bona fide* its efforts to tailor the plan narrowly.

IV

CONCLUSION

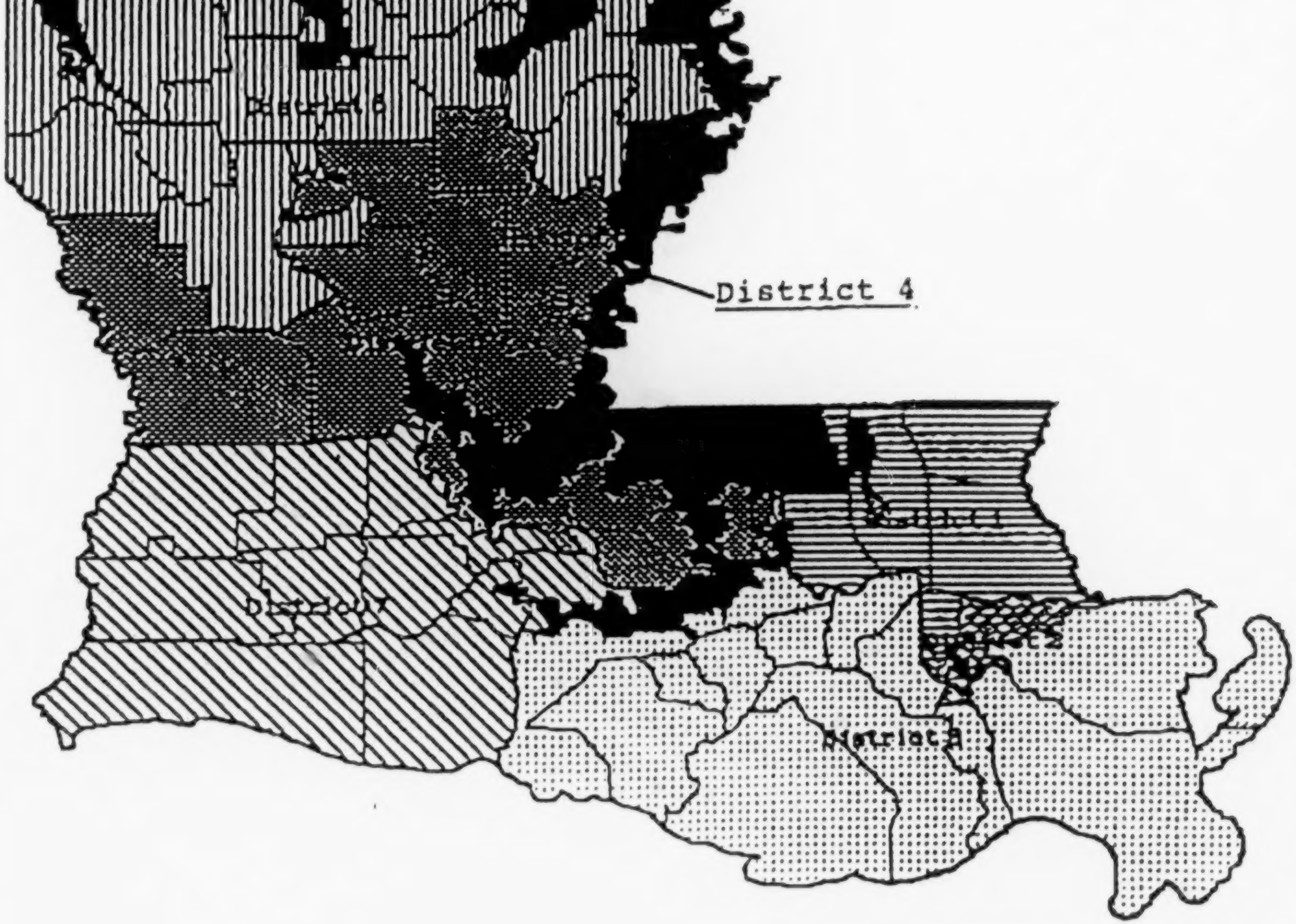
We find that the Plan in general and Louisiana's Congressional District 4 in particular are the products of racial gerrymandering and are *not* narrowly tailored to further any compelling governmental interest. We are therefore constrained to conclude that the Plaintiffs' right to equal protection as guaranteed by the United States Constitution is violated by the Plan. Consequently, we declare Act 42 of 1992 to be unconstitutional and the redistricting plan embodied therein to be null and void; and we enjoin the State of Louisiana from holding any future congressional elections based on the Plan. We do not, however, invalidate the 1992 congressional elections held thereunder; but we do hold that the term of office of each member of the United States House of Representatives from Louisiana who represents a district created under the Plan—and each district thus created—shall expire, *ipso facto*, at noon on the 3rd day of January, 1995, such terms of office and such districts not to be extended or carried over into the next Congress in any manner whatsoever.

APPENDIX A

The Seven Districts Created by Act 42

District	Total Pop.	Total White	Total Black	Total Reg. Vot.	Total Reg. Wh.	Total Reg. Blk.
District 1	602,859	528,079	60,895	325,140	296,356	26,238
	100.00%	87.60%	10.10%	100.00%	91.15%	8.07%
District 2	602,689	213,832	367,460	295,953	113,917	177,634
	100.00%	35.48%	60.97%	100.00%	38.49%	60.02%
District 3	602,950	454,235	131,735	329,451	256,990	70,016
	100.00%	75.34%	21.85%	100.00%	78.01%	21.25%
District 4	602,884	198,389	400,493	309,357	112,241	195,351
	100.00%	32.91%	66.43%	100.00%	36.28%	63.15%
District 5	602,816	463,168	133,329	321,508	259,986	59,748
	100.00%	76.83%	22.12%	100.00%	80.86%	18.58%
District 6	602,854	502,982	87,718	329,071	289,575	38,032
	100.00%	83.43%	14.55%	100.00%	88.00%	11.56%
District 7	602,921	478,453	117,651	331,814	271,798	58,944
	100.00%	79.36%	19.51%	100.00%	81.91%	17.76%
Total	4,219,973	2,839,138	1,299,281	2,242,294	1,600,863	625,963
	100.00%	67.28%	30.79%	100.00%	71.39%	27.92%

APPENDIX B


District 6
District 4
District 1
District 7
District 3

Walter, District Judge, concurring:

I concur with the result of the majority opinion. However, since my examination of the case differs somewhat analytically, I write separately.

This court considered several questions: May a State enact a race-based reapportionment plan? If so, under what circumstances are race-conscious measures allowed? Finally, how do these requirements apply to Act 42.

I

LAW

> [I]n view of the constitution, in the eye of the law, there is no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved . . .
>
> The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law . . .
>
> The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race.

Plessy v. Ferguson, 163 U.S. 537, 558, 16 S.Ct. 1138, 1146 (1896) (Harlan, dissenting).

A

CONSIDERATION OF RACE IN REDISTRICTING LEGISLATION

Despite the legislation enacted to promote racial equality, many states remained recalcitrant to the Civil War amendments' mandates. Among the methods used by the states to evade the fifteenth amendment were poll taxes, literacy tests, and gerrymandered [1] districts. Responding to this perversion, Congress enacted the Voting Rights Act of 1965 "as a dramatic and severe response to the situation." *Shaw v. Reno*, —— U.S. ——, 113 S.Ct. 2816, 2823 (1993). Amended in 1982, section 2 of the Voting Rights Act prohibits the dilution of a minority group's voting strength while section 5 mandates pre-clearance of newly created districts for those states that employed disenfranchising schemes in the past. The purpose of the voting rights legislation is to prohibit State efforts to abridge or deny minority representation. To this end, when pre-clearance is sought under section 5, the Department of Justice usually seeks maximization of minority voting strength to promote minority representation.[2] Since legislators are thus obligated to consider racial factors when redistricting, a delicate balance arises between promotion of minority suffrage and the color-bland strictures of equal protection.

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[1] Gerrymander is "[a] name given to the process of dividing state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines." Black's Law Dictionary (5th Ed.).

B

EQUAL PROTECTION

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14 § 1. Interpreting this clause nearly a century ago, the Supreme Court held in *Plessy v. Ferguson*, 163 U.S. 537, 558, 16 S.Ct. 1138, 1146 (1896) that the separate but equal doctrine comported fully with the Fourteenth Amendment. *Id.* at 548. "The majority [in *Plessy*] held that persons could be legally classified and treated in such a manner because of their race when the classifying law was a reasonable exercise of the police power. This meant that such laws must be reasonable, good faith attempts to promote the public good and not be designed to oppress a particular class." John E. Nowak, Ronald D. Rotunda, *Constitutional Law*, 618 (1991). As the Court itself stated:

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[2] It is my opinion that *Shaw v. Reno* did not fully address the constitutional or statutory authority behind Department of Justice pre-clearance requirements that arguably go beyond the Voting Rights Act. Thus, the Supreme Court may very well hold the Department of Justice's reliance on minimum "safe" percentages unconstitutional. I do not reach that question today but am troubled by the effect that these demands are having upon states seeking administrative pre-clearance rather than a declaratory judgment from the District Court of the District of Columbia.

> [W]e think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the fourteenth amendment.

Plessy, 163 U.S. at 548, 16 S.Ct. at 1142.

Fifty-eight years later, *Plessy*'s flawed concept of equal protection was rejected. Although *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686 (1954) did not expressly overrule *Plessy* outside the realm of education, that case heralded the demise of separate but equal treatment of the races by the states. Over the past four decades, the Supreme Court has confronted the consideration of race in State and federal legislation and has fashioned specific guidelines for testing the constitutionality of such considerations.

The central purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 113 S.Ct. at 2824. "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility." *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 493, 109 S.Ct. 706, 722 (1989). Accordingly, the Court has "held that the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest." *Shaw*, 113 S.Ct. at 2825. This test is known as strict or heightened scrutiny and is justified because:

> [a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Croson, 488 U.S. at 493, 109 S.Ct. at 721. These equal protection principles apply to statutes that "although race-neutral, are, on their face, 'unexplainable on grounds other than race,' " and classifications that are ostensibly neutral but are an obvious pretext for racial discrimination. *Shaw*, 113 S.Ct. at 2825 (citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)).

Under current equal protection doctrine, "race-conscious state decisionmaking is [not] impermissible in *all* circumstances." *Shaw*, 113 S.Ct. at 2824 (emphasis in original). If State legislation contains explicit racial classifications, if it is inexplicable on grounds other than race, or if it contains race-neutral classifications that serve as mere pretext for racial discrimination, then courts are bound to apply the strict scrutiny regime. The classification must be *justified* by a *compelling* state interest, and then be *narrowly tailored* to fit that interest in order to survive constitutional scrutiny.

C

RACIAL GERRYMANDERING UNDER EQUAL PROTECTION

Redistricting legislation is almost always race-neutral on its face. Before *Shaw*, the Supreme Court had

> held that only two types of state voting practices could give rise to a constitutional claim. The first involves direct and outright deprivation of the right to vote, for example by means of a poll tax or literacy test . . . The second type of unconstitutional practice is that which affects the political strength of various groups in violation of the Equal Protection Clause. As for this latter category, [the Court] insisted that members of the political or racial group demonstrate that the challenged action have the intent and effect of unduly diminishing their influence on the political process.

Shaw, 113 S.Ct. at 2834 (White, J. dissenting). The latter category, known as "dilution," arises when voters are not deprived of the right to vote, but, through methods such as "cracking," "stacking," and "packing," certain groups are denied an *effective* vote. *See, United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) ("UJO"); *Voinovich v. Quilter*, 507 U.S. ——, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). Acknowledging UJO and its progeny, *Shaw* went further, holding that "district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." *Id.* at 2826.

Supporting this holding is the now famous case of *Gomillion v. Lightfoot,* 346 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) in which the Alabama legislature redefined the boundaries of Tuskegee, essentially excluding all but a few black citizens from the district. The result was "a strangely irregular twenty-eight-sided figure." *Id.,* at 341. The Court found the scheme repugnant to the Fifteenth Amendment, holding:

> . . . Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remain uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purpose to a mathematical demonstration, that the legislation is soley concerned with segregating white and colored voters . . .
>
> It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens.

Id. at 341, 342. Therefore, racial gerrymandering, or legislation that manipulates district lines to achieve a predetermined racial result is subject to strict scrutiny.

D

PROVING A RACIAL GERRYMANDER

"Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563. Such invidious discriminatory intent or purpose need not be the legislature's dominant or primary consideration. Rather, proof that invidious discriminatory purpose was a motivating factor in the legislation will suffice. *Id.* Because improper racial classifications rarely appear on the face of legislation, the Supreme Court has identified subjects of proper inquiry in determining whether racially discriminatory intent existed. For example, legislation that "bears more heavily on one race than another" may indicate discrimination, *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040 (1976), as will historical patterns, *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267, 97 S.Ct. 555, 564 (1977), legislative history, *Id.*, irrationality pointing to nothing but racial classification, *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064 (1886), and direct evidence adduced, as in this case, before a three judge panel. *Shaw* stands for the proposition that bizarre reapportionment schemes such as that challenged in North Carolina and Act 42 fall into the *Yick Wo* category and may, in and of themselves, be evidence of invidious discrimination.

Of course, these indicators may be rebutted by evidence of wholly legitimate purposes. "The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions." *Shaw*, 113

S.Ct. at 2826. When such legitimate purposes are disclosed and *accepted by the court*, heightened scrutiny is inappropriate. However, if the grounds asserted are an obvious pretext for racial discrimination or are simply *post hoc* arguments contrived to shield the segregation from judicial inquiry, the court must pursue the strict scrutiny regime.

E

STRICT SCRUTINY: WHEN IS A STATE INTEREST COMPELLING AND WHAT DETERMINES NARROW TAILORING?

1

COMPELLING STATE INTEREST

Few interests will be deemed "compelling" enough to justify State classifications according to race. The Supreme Court has given little indication as to what satisfies this portion of the strict scrutiny regime. However, the Court has accepted the correction of past governmental and private sector discrimination, *Richmond v. J.A. Croson*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed. 854 (1989), ethnic and racial diversification in the faculty and student bodies of state operated universities and professional schools, *see Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), and has suggested that States have a "very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and applied." *Shaw*, 113 S.Ct. at 2830. Despite the language in *Bakke*, the Court seems unwilling to allow any race-based measures outside a remedial setting[3]. *Croson*, 488 U.S. at 493, 109 S.Ct. at 721.

Although the States and their subdivisions may take action to remedy discrimination, "they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." *Croson*, 488 U.S. at 503, 109 S.Ct. at 727. That identification occurs when "judicial, legislative, or administrative findings of constitutional or statutory violations" are made. *Bakke*, 438 U.S. at 308-309, 98 S.Ct. at 2757-2758. Otherwise, "the dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Croson*, 488 U.S. at 504, 109 S.Ct. at 728.

2

NARROWLY TAILORED

Once an interest has been properly identified and accepted as compelling, the court must examine the classification in order to determine whether it is narrowly tailored to "fit" the interest involved. In deciding whether race-conscious remedies are appropriate, the court may consider several factors. Among these are the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief; and the impact of the relief on the rights of third parties. *U.S. v. Paradise*, 480 U.S. 149, 169, 107 S.Ct. 1053, 1066, 94 L.Ed.2d 203

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[3] Compliance with federal law under the Voting Rights Act may be viewed as remedial and, therefore a state interest and perhaps compelling.

(1987). However, the relief must not go beyond what is reasonably necessary to accomplish the compelling interests. *See*, *Shaw*, 113 S.Ct. at 2831.

Therefore, this court must first determine how the districts were drawn, that is, whether they were drawn along race lines or not. To do so, this Court will examine the factors listed in section D above. If the State counters with a legitimate non-racial explanation for Act 42's configuration, this Court will defer to the Legislature and refrain from reviewing the merits of their decisions. However, if a motivating factor behind the reapportionment scheme was racial, strict scrutiny applies. Then we turn to whether the State had a compelling interest supporting racial discrimination. We will expect the State to provide specific evidence warranting its action and require a nexus between the action and the interest. Finally, we will examine whether Act 42 itself was narrowly tailored to fit the compelling interest in light of the factors discussed above.

II

ANALYSIS

A

ACT 42 IS A RACIAL GERRYMANDER

This court found the evidence to indicate overwhelmingly that the intent of legislature was to divide Louisiana's congressional districts along racial lines. The inferential evidence and the direct testimony of legislators for both the plaintiffs and the State allow no other conclusion. It is true that the State attempted to demonstrate non-racial explanations for the highly irregular districts. In light of the testimony at both the trial and evidentiary hearing, these suggestions are but *post hoc* rationalizations.

The evidence before the Court demonstrated that the State Legislature acted as it did to gain preclearance and contrived the interest of correcting past discrimination for the purpose of the evidentiary hearing alone. Finally, as the majority notes above, most witnesses readily admitted to the availability of other plans less offensive to traditional districting patterns and or smaller racial discrepancies.

B

ACT 42 IS SUBJECT TO STRICT SCRUTINY

As our factual findings denote, Act 42 is a clear example of a racial gerrymander. Specifically, District 4 permits no conclusion other than classic segregation. Both the facial irregularity without plausible non-racial explanation[4] and the explicit testimony

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[4] The defense elicited testimony that District 4 actually represents certain commonalities of interest. Essentially, the State suggested that certain interests are predominantly shared by Blacks and therefore District 4 has a sufficient non-racial justification. This is exactly the type State action that our color-blind Constitution prohibits. As the *Shaw* Court held:

> "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which

of the legislators require this finding. Since redistricting along racial lines was a *motivating factor*, Act 42 is subject to strict scrutiny. This panel must now determine whether Act 42 was justified by a compelling governmental interest and that the means chosen by the State to effectuate its purpose were narrowly tailored to the achievement of that goal.

1

COMPELLING INTERESTS

The State advanced two main compelling interests behind the racial gerrymander. I discussed the findings required by *Croson*, *Wygant*, and *Bakke* when a State attempts to rely on prior discrimination as

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> they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.
>
> The message that such districting sends to elected representatives is equally pernicious. When a district is obviously created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy." *Id.* at 2827.

I agree with what I perceive to be Justice O'Connor's views. If a multi-cultural State in which voters shared interests not according to the color of their skin but the content of their lives and experiences was the Legislature's goal, the tampering would have resulted in more evenly split districts. The races would then have to reconcile their differences with one another and move forward on common ground.

a foundation for remedial action. I see no reason why the same analysis should not apply when a state argues that compliance with federal anti-discrimination law mandated the jurisdiction's race-based action. In order to rely on "remedying past discrimination" and "obeying the law," a State must "demonstrate a strong basis in evidence for its conclusion that remedial action was necessary." *Croson,* 488 U.S. at 510, 109 S.Ct. at 730. I examine each purported interest in turn to see if the State has met this burden.

a

Past or Present Discrimination

"Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant,* 476 U.S. 276, 106 S.Ct. 1848. The Supreme Court has firmly held that States must have "convincing evidence that remedial action is *warranted.*" *Id.* While there is no doubt that Louisiana has a sorry history of race relations, the defense did not provide evidence that the Legislature had before it the necessary factual predicate warranting a voluntary affirmative action redistricting plan. In fact, the evidence supports the conclusion that the Legislature did not create Act 42 for the purpose of remedying past discrimination at all. Thus, if the State does intend to redistrict along racial lines with the goal of correcting past electoral discrimination, it must demonstrate what evidence warrants a finding of discrimination and how a specific plan relates to the elimination thereof.

b

Pre-clearance from the Department of Justice

The State legislators acted under the assumption that failure to create a second majority-minority district would result in the denial of pre-clearance by the Department of Justice. This assumption seems to be founded upon the rejection of two non-congressional plans by the Department of Justice. However, both letters from the Civil Rights Division acknowledged that the plans satisfied Section 5 pre-clearance requirements but rejected the plans because they could have been drawn more effectively. The *Shaw* opinion held that a state interest in complying with federal law is compelling only as constitutionally interpreted and applied. Additionally, by pointing out the distinction between what the law *requires* and what it *permits*, the Court stated that even valid plans under the Voting Rights Act must comport with the Fourteenth Amendment. Because the Voting Rights requirements do not give covered jurisdictions *carte blanche to* engage in racial gerrymandering in the name of nonretrogression, the question for this court is whether the State of Louisiana had a strong basis in evidence for the belief that failure to create a second majority-minority district would violate Section 2 or 5 of the Voting Rights Act.

(1)

Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 was enacted to accomplish the guarantees of the Fifteenth Amendment. Specifically, Section 2(a) prohibits the imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." This section therefore rejects State actions that, "interacting with social and historical conditions, impair the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, —— U.S. ——, 113 S.Ct. 1149, 1155 (1993). If, under the totality of the circumstances, a State's apportionment scheme has the effect of diminishing or abridging the voting strength of a protected class, a Section 2 violation has occurred. *Id.* These "dilution" claims involve three threshold conditions.

> First, they must show that the minority group 'is sufficiently large and geographically compact to constitute a majority in a single member district.' Second, they must prove that the minority group " 'is politically cohesive.' " Third, the plaintiffs must establish 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'

Id. at 1157 (quoting *Gingles*, 507 U.S. 30, 50-51, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25 (1986)). District 4 is evidence alone that the minority population large enough to constitute a majority in a single member district is not geographically compact. Without satisfaction of this initial *Gingles* condition, it is impossible to find that the State had a rational basis to believe that failure to create a second majority-minority district would violate Section 2. Reliance on possibly invalid applications of the Voting Rights Act by the Department of Justice cannot create a compelling state interest. If so, the Department of

Justice and various States could sidestep the holdings of *Croson*, *Gingles*, and *Shaw* with ease.

(2)

Section 5 of the Voting Rights Act

Similar findings are required under the "nonretrogression" analysis of Section 5. If the State had no basis to believe that one majority-minority district out of seven districts would constitute retrogression, then reliance on Section 5 as a compelling interest is misplaced. "Under [the nonretrogression] principle, a proposed voting change cannot be pre-cleared if it will lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Shaw*, 113 S.Ct. at 2830 (quoting *Beer v. U.S.*, 425 U.S. 130, 141, 96 S.Ct. 1357, 1364, 47 L.Ed.2d 629 (1976)). On its face, creating one district out of seven when the previous ratio was one district out of eight is not retrogressive. Once again, the legislature appears to have founded their belief that one district out of seven is retrogressive completely on the Department of Justice's previous unrelated rulings and the assumption that a gerrymandered second district was a requisite to pre-clearance. Without restating the points made above, I find such an assumption, without additional evidence, uncompelling.

In summary, I find *post hoc* reliance on past discrimination and warrantless assertions that the Voting Rights Act mandated a second district, unpersuasive. This is not to say that the State cannot rely on those interests to justify future affirmative action. Rather, I find that the basis forwarded by the State to claim these interests as compelling is so slim that they reek of the pretextual and the contrived.

2

NARROWLY TAILORED

Even if this panel were to overlook the dearth of *Croson*-type findings in this case, Act 42 cannot be termed narrowly tailored to fit the interests above. Since I concur in the majority opinion, I find no reason to reiterate their conclusions that Act 42 is not narrowly tailored to fit any compelling interest.

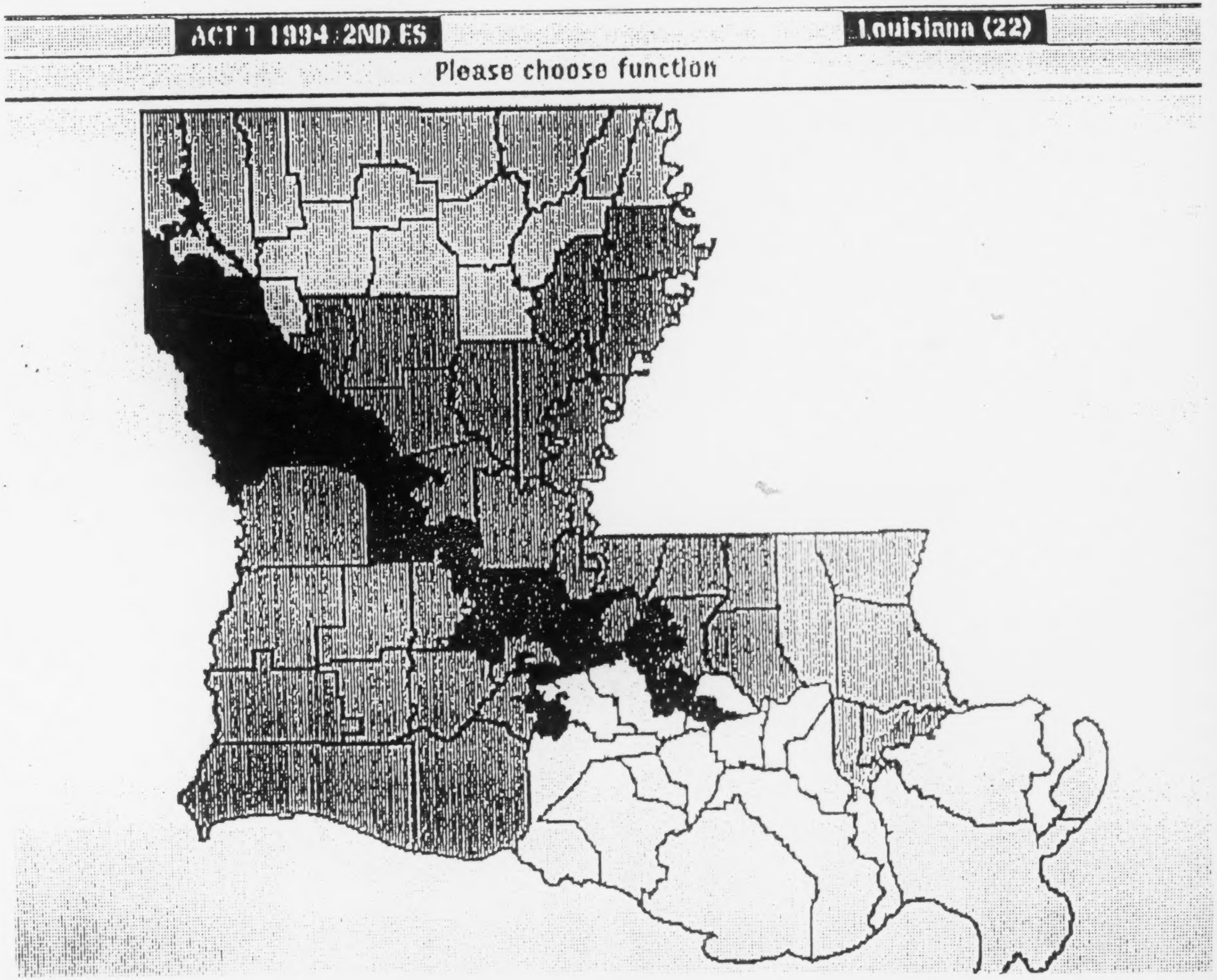
III

CONCLUSION

I am gravely disturbed by the history of racial discrimination in this country and State, but I believe that segregation of voters by race will achieve nothing but more discrimination, more separation, more animosity and would push Justice Harlan's and Dr. King's dream for this nation ever further into the future. One hundred and thirty years ago this nation endured a bloody civil war to ensure freedom and equality for all. That pledge, so dearly bought, remains elusive, but the concept that people defined only by race should receive separate representation in the legislative bodies of our government mocks the goals for which so many have suffered and died. Indeed, in my opinion, it breathes life into the discredited doctrine announced by the majority in *Plessy*, forty years after the Supreme Court administered what should have been its mortal wound.

The districts created under Act 42 are the creatures of a racial gerrymander. The circumstantial and direct evidence supported no other conclusion. Therefore, strict scrutiny applies to Act 42. Under that regime, the justifications offered by the State for its race-based measures were not accompanied by the requisite factual predicate. Additionally, the measures taken were not narrowly tailored to fit the interests, however baseless, advanced by the State.

APPENDIX D



ACT 1 1994 2ND ES

Louisiana (22)

Please choose function

LOUISIANA

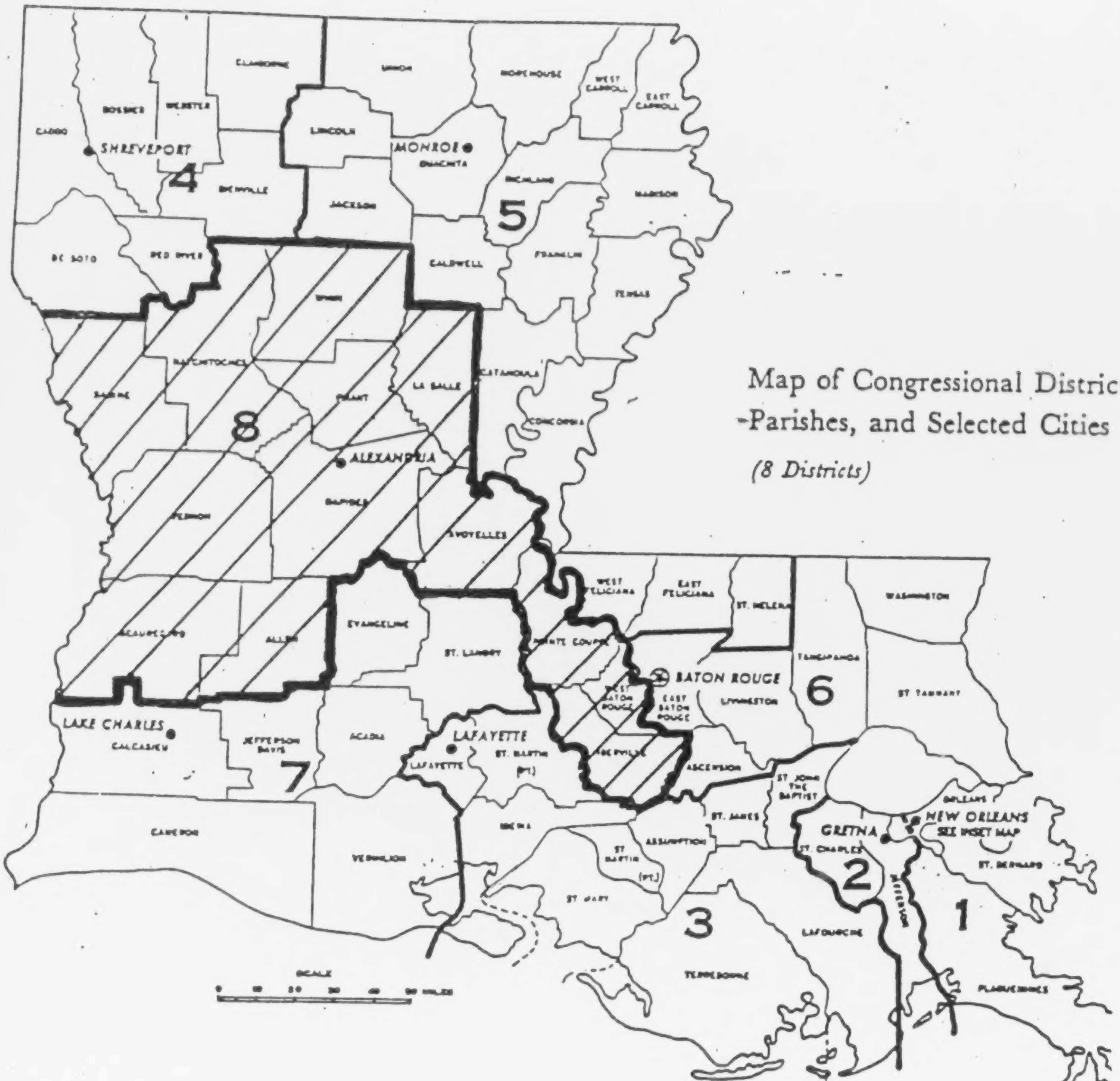
90th Congress

1967-1970

Map of Congressional District

-Parishes, and Selected Cities

(8 Districts)

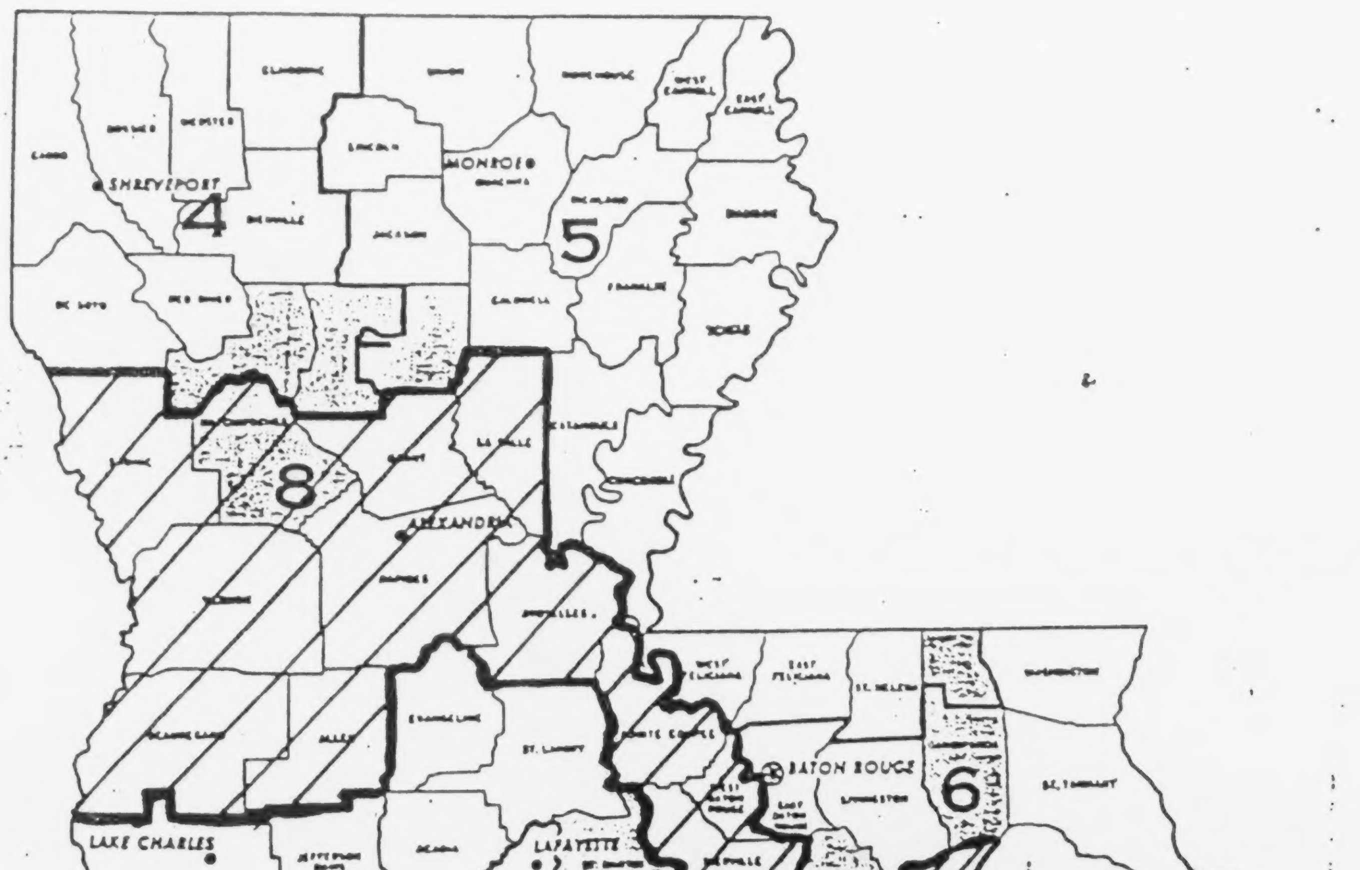


U.S. Department of Commerce
Bureau of the Census

1971-1972

LOUISIANA

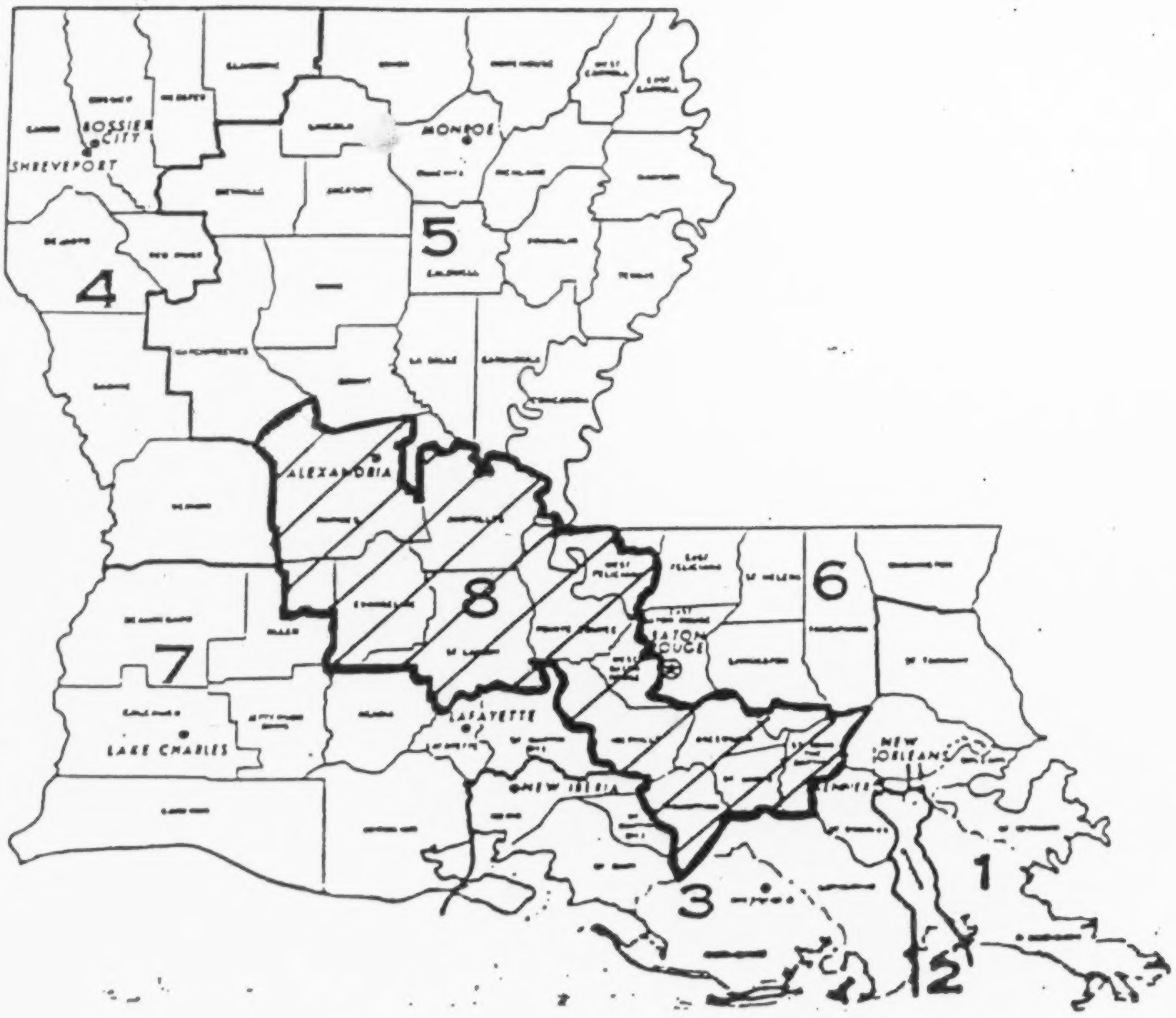
(8 districts)



LOUISIANA

(8 districts)

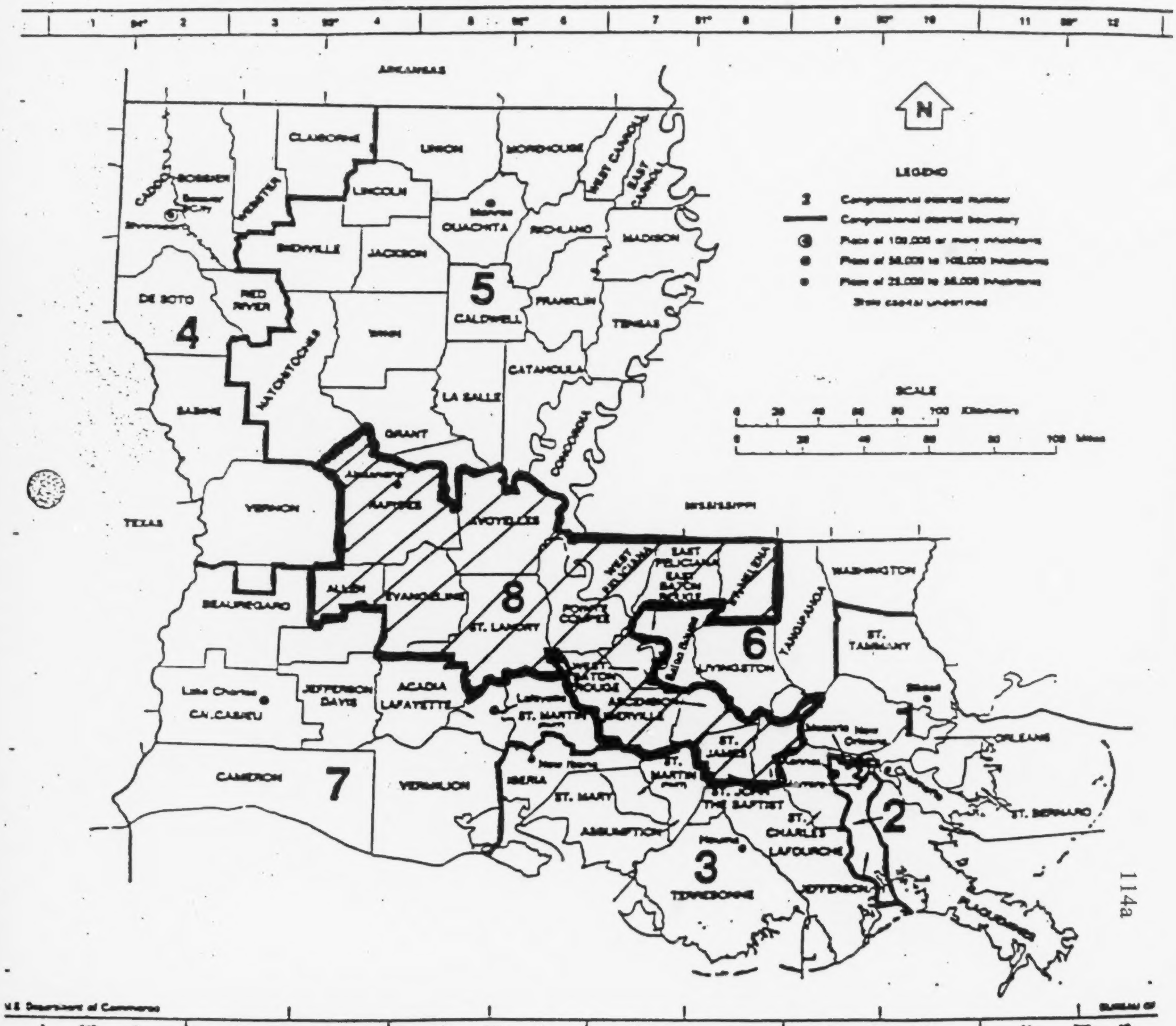
1973-1982



1983-1992

LOUISIANA

LOUISIANA — Congressional Districts, Parishes, and Selected Places — *(8 Districts)*



…ssional districts established November 20, 1981; all other boundaries are as of January 1, 1980.

APPENDIX E

[Filed Jul. 26, 1994]

IN THE
UNITED STATES DISTRICT COURT FOR
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Civil Action No. CV 92-1522S

RAY HAYS, EDWARD L. ADAMS,
SUSAN SHAW SINGLETON, AND
GARY STOKLEY, PLAINTIFFS

v.

EDWIN EDWARDS, in his official capacity as Governor of the State of Louisiana; SAMUEL B. NUNEZ, in his official capacity as President of the Louisiana State Senate; JOHN A. ALARIO, in his official capacity as Speaker of the House for the State of Louisiana; W. FOX MCKEITHEN, in his official capacity as Secretary of State for the State of Louisiana; JERRY FOWLER, in his official capacity as Commissioner of Elections for the State of Louisiana; and certain UNIDENTIFIED STATE LEGISLATORS, DEFENDANTS

UNITED STATES OF AMERICA,
DEFENDANT-INTERVENOR

NOTICE OF APPEAL

Notice is hereby given that the defendant-intervenor, United States, hereby appeals to the

United States Supreme Court from the Judgment of the United States District Court, Western District of Louisiana (three-judge court), entered on July 25, 1994.

This appeal is taken pursuant to 28 U.S.C. 1253.

Respectfully submitted,

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Assistant Attorney General

/s/ Richard Jerome
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Assistant U.S. Attorney
United States Courthouse
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Shreveport, Louisiana 71101

APPENDIX F

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 5 of the Voting Rights Act, 42 U.S.C. 1973c provides:

> Whenever a State or political subdivision with repect to which the prohibitions set forth in section 1973b(a) of this title based upon determina-

tions made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney Geenral has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

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